81-2139

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

DONALD E. TYLER,
Petitioner

v.

THE HARTFORD INSURANCE GROUP, FRANCES FRY, and ROBERT S. BRITTAIN.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS AND THE SUPREME COURT OF COLORADO

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QUESTIONS PRESENTED

1. Has the petitioner been denied without due process of law his right to trial for damages in a civil case for each and all of his claims for relief including for (a) libel, (b) slander, (c) unlawful interference with his lawful practice of medicine and pursuant to conspiracy, (d) deprivation of valuable rights protected by the Fourteenth Amendment of the U.S. Constitution without due process of law, and (e) emotional distress intentionally caused by the outrageous conduct of defendants?

2. Was the doctrine of collateral estoppel inappropriately and erroneously applied in this case which deprived the petitioner of his right to trial?

3. Did the Colorado Courts error in denying the petitioner the right to any and all discovery he sought?

4. Does Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 582, 41 L.Ed.2d 789 (1974), make inactionable for libel and/or wrongful intentional interference with practice of a profession republications, by persons other than the author, of a libelous per se document concerning one's profession, concerning a private matter, stated in form of fact, and with no public media involved, if it is an opinion of the author?

5. In review of dismissal by summary judgment, did the Colorado Courts error in rejecting as part of the record on appeal depositions of defendants and co-conspirators taken in a related case and incorporated in this case by affidavit?

6. Did the Colorado Courts error in not considering the total allegations in each of the claims for relief?

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IN THE

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DONALD E. TYLER,

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THE HARTFORD INSURANCE GROUP,

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Respondents

PETITION FOR WRIT OF CERTIORARI TO

THE COLORADO COURT OF APPEALS AND

THE SUPREME COURT OF COLORADO

To the Honorable Chief Justice and

Associate Justices of the Supreme Court of

the United States:

Donald E. Tyler, the petitioner herein,

prays that a writ of certiorari issue to review

the judgment of the Colorado Court of Appeals

entered in the above entitled case on

December 31, 1981, and denial of petition for writ of certiorari by the Colorado Supreme Court on March 29, 1982.

OPINIONS BELOW

The judgment of the Colorado Court of Appeals, not selected for publication, is printed in Appendix A, hereto, infra, pages A-1 through A-15. Its order denying petition for rehearing is printed in Appendix A hereto, infra, page A-16. The order of the Colorado Supreme Court denying petition for writ of certiorari is printed in Appendix A hereto, infra, page A-17.

JURISDICTION

The judgment of the Colorado Court of Appeals (Appendix A, pages A-1 through A-15) was entered December 31, 1981. A timely filed petition for rehearing was denied on January 28, 1982. (Appendix A, page A-16)

A timely filed petition for writ of certiorari was denied by the Colorado Supreme Court on March 29, 1982. (Appendix A, page A-17) This petition is timely filed in accord with 28 U.S.C. § 2101(c). The jurisdiction of the U.S. Supreme Court is invoked under the 1st, 7th, and 14th Amendments of the U.S. Constitution. The plaintiff has been denied his right to trial for damages without due process of law which includes claim under 42 U.S.C. § 1983 and claims under common law.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED

The First Amendment to the U.S. Constitution provides in pertinent part:

> Congress shall make no law respecting... the right of the people...to petition the Government for a redress of grievances.

The Seventh Amendment to the U.S.

Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

Article II of the Constitution of the State of Colorado provides in pertinent part:

> Sec. 6. Equality of Justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be adminstered without delay.
>
> Sec. 10. Freedom of speech and press. No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury,

under the direction of the court, shall determine the law and the fact. (emphasis added)

Colorado Revised Statutes, 1973, provide in pertinent parts:

18-4-412. Theft of medical records or medical information - penalty. (1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

...

(3) Theft of a medical record or medical information is a class 5 felony.

12-43.5-102. Establishment of review committee - function. (1) A review committee may be established pursuant to this section to review and evaluate the quality of care being given patients by any physician licensed under article 36 of this title, in order to protect patients against the unauthorized, unqualified, and improper practice of such physician. (2) .... Such a committee may be authorized to act only by: ... (d) A

society or an association of physicians whose membership includes not less than one-third of the medical doctors or doctors of osteopathy licensed to practice and residing in this state if the physician whose services are the subject of review is a member of such society or association.

(3) (a) ... An investigation may relate .. or any other matter affecting the quality of care provided.

(b) (I) If the findings of the investigation indicate substantial lack in the quality of care rendered by such physician, the review committee shall hold a hearing to consider the findings; ...

(II) The physician allegedly offering substandard care shall be notified of such a hearing, shall have a right to be present and be represented by counsel at such hearing, and shall be allowed to offer evidence in his own behalf.

(c) After such hearing, the review committee shall make any recommendations it deems necessary for the discipline of such physician to the governing board of the hospital or as provided by written bylaws of the hospital or by federal law or regulation. A copy of such recommendations shall be given to the physician allegedly offering substandard care, and he shall have the right to appeal the decision of the review committee to the governing board or other body to which the recommendations are made. ... (emphasis added)

10-4-109. Nonrenewal of medical malpractice policies. (1) No insurer shall refuse to renew a policy of medical

malpractice insurance unless such insurer or its agent mails or delivers to the named insured, at the address shown in the policy, at least sixty days' advance notice of its intention not to renew. ...
(4) In the event an insurer refuses to renew, the insured may, by written request, demand a written notification of the reasons for nonrenewal. Such notification shall be given the insured within twenty days after receipt of such request. ...

13-90-107. Who may not testify without consent - records. ...(d) A physician or surgeon duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient, but this paragraph (d) shall not apply to:
... (III) A review of a physician's services by any of the following:
... (D) A peer review committee of a society or association of physicians ... and only if ... said physician has signed a release authorizing such review; ...

Colorado Rules of Civil Procedure provide in pertinent part:

Rule 26. General provisions governing discovery. ... (b) Scope of Discovery. ... (1) In General. Parties may obtain discovery regarding any matter, not

privileged, which is relevant to the subject matter involved in the pending action, ...

(3) Trial Preparation: Materials. Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party of or by or for that other party's representative(including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. ... (emphasis added)

Rule 36. Requests for Admission. ... The matter is admitted unless, within thirty days after service of the request, ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, ... (emphasis added)

STATEMENT OF CASE

This action was commenced on April 28, 1977. The complaint is printed in Appendix A hereto, infra, pages A-18 through A-73 and

amendments thereto were filed December 29, 1977, Appendix A, pages A-74 through A-85.

The undisputed facts of the case as established by depositions in related lawsuits incorporated in this case by affidavit of the plaintiff, affidavit of the plaintiff that all allegations of the complaint are true, other affidavits of the plaintiff, unanswered requests for admission directed in this lawsuit to the defendants including admission that all allegations of the complaint and amended complaint are true and correct pursuant to Rule 36, C.R.C.P., supra, and testimony and jury findings in related lawsuits include the following facts.

The petitioner is a Mayo Clinic-trained urologist certified by the American Board of Urology. His established medical practice was maliciously destroyed and he has been unable to work at his chosen profession since

1977 as a proximate result of the illegal acts committed intentionally for the unlawful purpose of malicious interference with his medical practice and other malicious reasons by defendants in this case and their co-conspirators.

The petitioner was a member of the medical staff of a small community hospital, and a part of the responsibilities included rotation to provide emergency care in the emergency room. Medical staff officers were elected annually on an informal rotation basis. Doctors Marks and Larsen came to the community in 1971 directly from residencies in radiology and surgery, respectively. In 1974 they were elected president and vice-president of the staff, which made them two of the three members of the executive committee. Utilizing that committee they

proceeded to systematically eliminate competition of a "clinic" group they organized. They attempted to entrap the petitioner and the entrapment failed. In spite of failure of the attempted entrapment, they scheduled a disciplinary hearing of the petitioner related to emergency room practice which they admitted to be without charges and without the required written request for corrective action. Notice for hearing was defective in lacking specific charges and was untimely. (Appendix A, pages A-97 and A-98.) The petitioner did not appear and was consequently wrongfully denied reappointment to the hospital medical staff, and was "blacklisted" from other hospital medical staffs. Suit was commenced against Marks, Larsen, and others in June, 1975. Trial to a jury ending March 6, 1980, resulted in the jury

finding for the petitioner apportioned damages in the amount of $730,000,00. Interrogatories answered by the jury found a conspiracy as alleged. There was no legitimate defense. That case is subject of pending petition for writ of certiorari by this Court, No. 81-2007.

Separated from that suit was a suit against Donald Gaylor and Dale Alter, Gaylor for publishing a libelous letter to Alter and against Alter for soliciting its writing and for republishing it. Donald Gaylor was not present and the information for his letter came from Gaylor's wife, an employee of competing urologists who then started practicing in that Brighton hospital. That lawsuit ended July 1, 1977, with a verdict for the defendants. The letter to Alter, subject of that suit, was ruled by the trial Court as a matter of law to be libelous per se, related

to the plaintiff's profession, and concerned a private matter. Contrary to the Appeals Court on page A-7, the issue of defamation was not presented to the jury. No competent evidence was presented directed to proving the truth of accusations of unprofessional conduct. Contrary to the false damaging statement of the Appeals Court on page A-3, the petitioner did not refuse treatment and there is no evidence in that case or in this case of such. Unanswered requests for admission to the defendants in the instant case established the undisputed facts of proper referral, a form of providing care. Referral of the 79 year old patient to her usual physician, a general surgeon not on the staff of the hospital, was completed while the patient was still in the emergency room. He assumed responsibility for her care, and there has been no claim of damage or harm

due to action or inaction of the petitioner. In appeal of that case for reversal, the Colorado Court of Appeals determined as a matter of law that the letter was not libelous because of expression of opinion, citing dicta in Gertz v. Welch, 418 U.S. 323, 94 S.Ct 582, 41 L.Ed.2d 789. That decision is printed in Appendix A, pages A-86 through A-96. Prior to determination of the appeal, the Colorado Court of Appeals reported that all trial exhibits were destroyed along with 50 depositions taken by the petitioner in that case and in the related Marks-Larsen case.

Marks and Larsen and the petitioner were each insured by Hartford. Marks and Larsen were each insured for one million dollars subject to claims by the petitioner in the aforementioned lawsuit against them. The Colorado Medical Society had and has a

vested interest because of a contract with Hartford which provides for refund of premiums to its insured members that are unused to pay Colorado claims, a substantial sum to each physician. To gain unlawful help in defending Marks and Larsen, including damaging the petitioner as alleged, and with full knowledge of the conspiracy in progress to damage the petitioner's medical practice, Hartford's claim adjuster, defendant Fry, published to defendant Robert Brittain, M.D., all files of Hartford related to the petitioner including but not limited to Exhibit A of the complaint (Appendix A, pages A-39 through A-41), correspondence among attorneys, Marks, Larsen, Fry, and other Hartford personnel, hospital medical records of patients of the petitioner unlawfully in its possession (see C.R.S. 18-4-412, supra),

and complaints in various pending lawsuits including exhibits thereto printed in Appendix A, infra, pages A-97 through A-101.

Brittain, a member of the Risk Management Committee of the Colorado Medical Society, republished the contents of the aforementioned false defamatory documents and medical records at meetings of the committee which non-member, non-physicians attended. Members of the committee have admitted that a primary purpose of the committee was to aid Hartford in defending lawsuits against insured physicians. The pending cases instituted by the petitioner as plaintiff did not involve any accusations of substandard care which was admittedly recognized by the defendants. They had no accusations of such for their jurisdiction. The only lawful jurisdiction of the committee was concerning

quality of medical care. C.R.S. 12-43.5-102, supra. Brittain and other committee members proceeded to write the petitioner a series of deceitful, abusive, threatening, harassing, intimidating letters which in effect demanded that the petitioner grant them permission to examine all hospital medical records of persons cared for by him. The letters are printed in Appendix A, infra, pages A-42 —A-44, A-79— A-85, A-102— A-114. Contrary to the false statement of the Colorado Appeals Court on pages A-3 and A-4, as can be readily seen in the letters, the petitioner was not requested to produce records. Apparently the Court preferred to avoid the issue of the felony of theft and attempted theft of medical records by defendants. C.R.S. 18-4-412, supra. The defendants were clearly coercing the

the petitioner to grant them permission to examine medical records without a medical care reason,which would constitute a felony. The petitioner had not been supplied a reason to justify his consenting to such breach of patients' confidences, contracts, and C.R.S. 13-90-107 which provides for a required release or permission without a provision mandatorily requiring the physician to grant such. C.R.S. 13-90-107, supra. The purported deceitful reason the defendants and co-conspirators gave for their demand in their letter and in contemporaneous depositions taken in related cases, on its face not in the jurisdiction of the committee, was to determine whether records of patients seen three years before, in 1974, in Brighton Community Hospital and particularly in the emergency room and other patients were

adequate for legal purposes in the hypothetical event the petitioner were sued. See pages A-79— A-81 and A-82. They never indicated a concern with quality of care of any patient or group of patients.

The committee members admitted in depositions in related cases that they had no reason to believe the petitioner would be sued and that they knew that the statute of limitations for such actions was two years. When the letters were written in 1977, the committee knew that the petitioner was not practicing in any emergency room. (see A-79) The inference is clear that the committee's interest was not related to present insurance matters but was connected to the lawsuit against Marks and Larsen. The hearing scheduled by Marks and Larsen about emergency room practice in 1974 was

without charges, and the insurer, Hartford, desperately needed a fishing expedition. The letters threatened and recommended non-renewal of the petitioner's professional liability insurance, an act clearly beyond authority by C.R.S. 12-43.5-102, and from which that statute provided no appeal in contrast with availability of appeal for acts performed within the jurisdiction of that statute. Hartford then imposed the unconcionable condition precedent to any renewal of the petitioner's insurance permission to Hartford for it to examine all medical records of patients cared for by the petitioner in breach of professional ethics, in breach of contracts with patients, in invasions of privacy, and in violation of C.R.S. 1973, 18-4-412. The plaintiff did not yield to such unlawful oppression. The

committee of which Brittain was an acting member then acted without notice of hearing, without charges, and without hearing and determined that the petitioner did not "cooperate." It is submitted that the term is common when one does not yield to unlawful oppression. For the "reason" he did not "cooperate," the committee recommended to Warren & Sommer, Inc., to not renew the petitioner's professional liability insurance. That was clearly in excess of jurisdiction provided by C.R.S. 12-43.5-102. The petitioner answered a letter (A-82) with the letter of A-115 requesting cooperation of the chairman to supply information, but the letter was unanswered by anyone.

The Colorado Courts dismissed the first claim for libel and the second claim for slander by applying the doctrine of collateral estoppel as to Exhibit A of the complaint and

determined other libelous documents identified in depositions in related cases (pages A-97 through A-101) were inactionable because the petitioner had included them as exhibits in a complaint. The Appeals Court acknowledged that they were identified as being referred to in requests for admission "in the prior cases." Of course they were involved in the other cases. But they were also identified in requests for admission in this instant lawsuit as included in the libel and slander alleged in paragraphs 4 and 13 of the complaint along with documents which revealed that there was no legitimate defense in the Marks-Larsen case. Defamation unidentified because of denied discovery was not addressed. The fifth claim for outrageous conduct intentionally causing emotional distress was dismissed

by summary judgment. The third claim for wrongful intentional interference with business and the 4th claim under 42 U.S.C. § 1983 were dismissed as not stating claims for which relief can be granted. The orders for dismissal are printed in Appendix A, infra, pages A-119 through A-147.

Right to trial for damages is a property protected by the Fourteenth Amendment. Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 151 U.S. 1, 19, 38 L.Ed. 55, 64,65 (1893). Trial by jury in civil suits as herein is a matter of right in Colorado. Miller v.Carnation Co., 33 Colo. App.62, 516 P.2d 661 (1973). In actions for libel and slander, both law and fact are to be determined by the jury. Colorado Constitution, Art. II, sec. 10, supra. The petitioner has been wrongfully denied his right to trial for

damages in violation of the 14th Amendment. Review by way of appeal is a matter of right. Monti v. Bishop, 3 Colo. 605 (1877); Hull v. Denver Tramway Corp., 97 Colo. 523, 50 P. 2d 791 (1935); Bankers Trust Co. v. Hall, 116 Colo. 566, 183 P. 2d 986 (1947). Departure from acceptable standards as here by the Colorado Court of Appeals is a denial of the right of appeal and of due process. Cochran v. Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453. The Appeals Court garbled facts in almost all significant statements. Its application of law as to the true facts of the case were consequently in gross error.

Estoppel inappropriately applied herein was one of the means employed which deprived the petitioner of his right to trial to recover damages. The petitioner was denied the benefit of stare decisis and the decision subject of this petition is not in accord

with decisions of this Court. First, and not addressed by the Appeals Court, the decision upon which estoppel is based clearly is labeled and designated "NOT SELECTED FOR PUBLICATION NOT TO BE CITED AS PREGEDENT IN ANY COLORADO COURT." The opinion clearly stated that it was to be applied to that case alone at the time this instant case was pending. The plaintiff relied upon that statement. (Page A-86)

Further, estoppel is not favored and all elements must clearly appear. Langley v. Young, 72 Colo. 466, 211 P. 640. Collateral estoppel requires precisely identical facts, issues and proofs in each case. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973); Ropacki v. Ropacki, 188 N.E. 400 (Ill. 1933); County of Mobile v. Kimball, 102 U.S. 691, 705, 26 L.Ed. 238, 242 (1880). Only issues litigated and adjudicated are subject to

collateral estoppel. Parrish v. DeRemer, 187 P. 2d 597 (Colo. 1947); RESTATEMENT JUDGMENTS § 68.

The facts litigated are different. The only letter adjudicated and to which the opinion of the Gaylor case, pages A-86 through A-96, applies is the letter as written therein (pages A-90 and A-91). That is the fact relied upon for applying estoppel. That letter, that fact, is different than the fact of the letter of Exhibit A of the instant complaint, pages A-39 through A-41. Exhibit A alleges unprofessional conversation; the letter of the Gaylor case does not. A jury would read the two letters as different whether the judges had difficulty or not. The judges' finding of fact as a matter of law can be re-examined. (see page A-92)

The issues and proofs are different. The

letter of the Gaylor opinion was written contemporaneously with the incident to which it refers. Contrary to the finding of the Appeals Court on page A-3, except for the date on the letter, an item unsworn to, there is nothing in the record to indicate that the letter of this case was written contemporaneously with the incident. Unanswered requests for admission establish that the Gaylor -Marks letter of this case was phony and written much later with a fraudulent purpose, and that it was written under the direction of defendants Fry and Hartford. Testimony by a document expert established that it was written much later than July 3, 1974. It was first produced by Marks in 1976, after the statute of limitation for libel as to its publication to him had passed, apparently for the fraudulent purpose for Gaylor and Alter to

claim damage came from the letter to Marks rather than from the letter to Alter which was subject of the libel suit in progress.

The opinion defense was initiated by the Appeals Court in the Gaylor case. It was not litigated or subjected to cross examination. The letter was found to be not actionable as defamation as a matter of law because of expression of opinion. The interpretation of statements of the letter was the Appeals Court's and not evidence in the trial. It is submitted that that defense is personal to Gaylor and not available to defendants herein for its republication. Squarely within the holding of Pomeroy v. Waitkus, supra, collateral estoppel cannot apply when the same defenses are not available in both cases.

The petitioner was unable to fully litigate the Gaylor case, and its appeal was defective

due to the Appeals Court. The trial exhibits were destroyed in that Court prior to determination of the appeal along with 50 depositions the petitioner took in that and the related Marks-Larsen case. That included the letter upon which estoppel herein was based. Collateral estoppel is inappropriate when there has been no opportunity to fully litigate the case relied upon. Pomeroy v. Waitkus, supra; William Whitman Co. v. Universal Oil Products Co., 92 F.Supp. 885 (Del. 1942).

Collateral estoppel is not applicable to questions of law. RESTATEMENT JUDGMENTS § 70. The determination of the character of the Gaylor-Alter letter as being non-defamatory was as a matter of law. (A-92) Estoppel is inapplicable.

Estoppel of record or judgment requires

the complete record in evidence of proceedings of the case upon which it is based. Missouri Utilities Co. v. City of California, 14 F. Supp. 613 (W. D. Mo., 1936); Lumbermen's Mut. Cas. Co. v. Lumbermen's Mut. Cas. Ins. Co. of New York, 19 So. 2d 865 (Fla. 1944); Johnson v. Ota, 43 Cal. App. 2d 94, 110 P. 2d 507 (1941); State v. Manpower of Omaha, 80 N. W. 2d 580 (Neb. 1957). None of the record of the Gaylor case was in evidence in either the trial Court of the Appeals Court.

The application of the doctrine of collateral estoppel to this case was clearly error by all accepted procedural and substantive standards.

Further, it is submitted that Exhibit A of the complaint is as a matter of law obviously libelous per se. In common law defamation is actionable regardless of form, including form of opinion. 53 C. J. S. p. 46. Even

under conditions some courts allow damage to reputation by form of opinion, the letter is actionable as defamation because of undisclosed facts of words defamatorily stated to be unprofessional, the body of undisclosed facts of the "unprofessional situation," basis of alleged discrimination, the charge of unprofessional conversation and conduct were made, the matter is not of public concern, and no public media is involved. RESTATEMENT (SECOND) TORTS § 566; PROSSER: Handbook of the Law of Torts, 4th Ed., pp. 711, 712.

Republications of documents appended to a complaint prior to their presentation in public proceedings which are defamatory are actionable for libel at common law and respecting persons other than this petitioner in Colorado. Meeker v. The

Post Printing and Publishing Co., 44 Colo. 355, 135 P. 457; Switzer v. Anthony, 71 Colo. 291, 206 P. 391 (1922); Park v. The Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888); Parsons v. Age-Herald Pub. Co. 61 So. 345 (Ala. 1913). The Colorado Courts denied the right of trial as to republications of libelous documents appended as exhibits to a complaint, Appendix A, pages A-97 through 101. Those documents were included in paragraphs 4 and 13 of the complaint.

Damages due to wrongful intentional interference with business are subject to civil suit. Lohse Patent Door Co. v. Fuelle, 114 S.W. 997 (Mo. 1908). This includes interference with one's business insurance. Palatine Ins. Co. v. Griffin, 202 S.W. 1014 (Tex. Civ. App. 1921). It is submitted that a jury would easily find that the petitioner

had an expectancy to continued relationships with Warren & Sommer, that he had an expectancy to have his malpractice insurance renewed, that he had an expectancy to not have his insurability damaged, and that the damage alleged affecting his insurance damaged his practice of medicine. Other damage is also alleged.

At common law civil conspiracy involves a lawful purpose accomplished by unlawful means or an unlawful purpose to be effected. McGlasson v. Barger, 431 P.2d 778 (Colo. 1967); Pettibone v. U.S., 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419; Alaska SS.Co. v. Internat'l Longshoremen's Assoc., 236 F. 964 (D.C. Wash., 1916); Duplex Printing Press Co. v. Deering, 41 S.Ct. 172, 254 U.S. 443, 65 L.Ed. 349.

Even if one accepts the untenable

conclusion that the petitioner was not defamed, the petitioner clearly alleged all elements necessary to maintain an action for interference with business by individual defendants and by conspiracy. Unlawful purpose of interference with business has been alleged. Palatine Ins. Co. v. Griffin, supra. Persons joining a conspiracy in progress as herein become responsible for the acts committed prior to such entry of which they had knowledge as herein. Dextone v. Building Trades Council, 60 F.2d 47 (2nd Circ, 1932). Contrary to the false statement of sequences by the Appeals Court on page A-3, Tyler was not removed from emergency room duty after the acts by the defendants herein. Tyler was removed from emergency room call duty in 1974 as part of the conspiracy found by a jury in 1980 in the case against

Marks and Larsen. Defendants joined that conspiracy in 1976, two years after the removal from ER duty. Many overt unlawful acts by defendants have been alleged other than republications of the Gaylor letter, although it is still conceded that those are acts sufficient to maintain the action. Clark v. Machette, 92 Colo 365, 21 P2d 182 (1933); Strollo v. Jersey Cent. Power & Light Co., 20 N.J. Misc. 217, 26 A.2d 559 (1942); Aluminum Siding Corp. v. Dun & Bradstreet, Inc., 163 F. Supp. 906 (S.D.N.Y. 1958); Ledwith v. International Paper Co., 64 N.Y.S 2d 810 (1946), affd. 271 App. Div. 864, 66 N.Y.S. 2d 623. Contrary to the Appeals Court, many cases hold that the overt act can be lawful and innocent if the purpose is to wrongfully interfere with business as alleged herein, and action maintained.

Am. Tobacco Co. v. U.S., 328 U.S. 781, 90 L.Ed. 1575, 66 S.Ct. 1125; Fort v. Coop. Farmers Exch., 256 P. 319 (Colo. 1927); (Colo. 1927); Martin v. Am. Home Prod. Corp., 94 F.Supp. 57 (S.D.N.Y., 1950); Ledwith v. Internat'l Paper Co., supra.

Allegations must be accepted as true when considering sufficiency of a complaint. Colo. Nat'l Bank v. F.E. Biebert Co., 165 Colo. 78, 438 P.2d 506. The Court of Appeals wrongfully determined that the Risk Management Committee was acting within jurisdiction of C.R.S. 12-43.5-101 and in good faith. (A-11). On their face, none of its requests to examine records was related to quality of medical care. Their only claimed interest was in record-keeping. There is no competent evidence that the committee qualified under C.R.S. 12-43.5-

102. It claimed existence for years before that statute was enacted in 1975. (see p. A-80) The name of the committee as named by the Appeals Court on page A-5, paragraph 1, is a figment of imagination. What amounts to coercion, intimidation, or threats of injury to conduct of a business is a matter of fact and depends upon each particular case. Lohse Patent Door Co. v. Fuelle, supra. The character and effect of a conspiracy are not to be judged by dismembering its parts, as the Appeals Court did here, but the whole picture is to be considered by a jury. Am. Tobacco Co. v. U.S., 147 F.2d 93 (6th Circ, 1944).

In the 4th claim under 42 U.S.C. § 1983, the petitioner claims he was deprived of Constitutionally protected rights including right to be free from threats, intimidation, oppression, and other interference in his

practice of medicine done here under color of state law. Adler v. Montefiore Hosp. Assoc. of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634; U.S. v. Classic, 313 U.S. 299, 85 L.Ed. 1368; Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473. The Appeals Court erroneously ruled that for purposes of 42 U.S.C. § 1983 that there is no state action "unless a state statute compels a private party to act in a certain way." (A-14) That is in conflict with the intent of the statute and with decisions of this Court. U.S. v. Classic, supra. The defendants flashed as their badges of authority Colorado statutes designated in their letters.

The outrageous conduct claim was not dismissed for failure to state a claim for which relief can be granted. It was later dismissed by summary judgment and by

avoiding the allegations in paragraphs 22-41 of the complaint incorporated in the claim for outrageous conduct. Further, the necessity of profane, insulting language is a new and untenable requirement. Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753; Meiter v. Cavanaugh, 40 Colo. App. 454, 580 P.2d 399. The totality of conduct of defendants and in relationship to their positions of trust and power to affect the interest of the petitioner was erroneously ignored. See RESTATEMENT 2d, TORTS § 46, comment (e)(1965). Malicous threatening conduct as herein by an insurance company with one it insures even under color of exercising its rights may subject it to action for outrageous conduct. Fletcher v. Western Nat'l Life Ins. Co., 10 CA3 376, 89 CR 78. Further, stay of discovery deprived the plaintiff of facts

solely within knowledge of defendants to develop his case. See Slagle v. U.S., 228 F.2d 673 (5th Circ, 1956); Udemstock v. Am. Mortg. & Invest. Co., 495 F.2d 589 (10th Circ, 1974); Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99.

Discovery

The Appeals Court erroneously considered motions to dismiss for lack of prosecution which were not heard or ruled upon by the trial court. 27 C.J.S. p. 460. This case was commenced April 28, 1977. On July 19, 1977, the plaintiff-petitioner requested defendants Brittain, Fry, and Hartford to produce documents and things included in 10 paragraphs. They included all documents in their possession related to the petitioner. They specifically listed reports of surveillances of the petitioner and all

documents Fry and Hartford published to Brittain. That discovery was refused and the petitioner filed a motion to compel that discovery on October 3, 1977. That was within 6 months of the commencement. It was erroneously denied. The order is printed in Appendix A, pages A-148 through A-151.

None of the materials requested were prepared for this trial, and none were prepared for these defendants. They were prepared for Marks and Larsen. They did not come under the exception to discovery of C.R.C.P. Rule 26(b)(3), supra. The documents disclosed to Brittain are at the heart of this lawsuit. They were ar are essential, and are solely within the knowledge of the defendants. There can be no substitute. Disclosure to Brittain, an outsider, by Fry and Brittain waived their secret

nature which extended to the whole transaction. Fearnley v. Fearnley, 44 Colo. 417, 98 P. 819; 97 C.J.S. pp. 865, 869; U.S. v. Kelsey-Hayes Wheel Co. 15 F.R.D. 461 (E.D. Mich S.D. 1954); Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448 (D.C., S.D. N.Y., 1955); D'Ippolito v. Cities Service Co., 39 F.R.D. 610 (S.D.N.Y., 1965); Philadelphia Electric Co. v. Anaconda American Brass Co., 275 F.Supp. 146 (D.C. E.D. Pa, 1967); B & C Trucking Co. v. Holmes & Narver, Inc., 39 F.R.D. 317 (D.C. Haw. 1966); Doughtery v. Gellenthin, 99 N.J. Super. 283, 239 A.2d 280 (1968).

After such denial of essential discovery, the plaintiff- petitioner proceeded to vigorously prosecute the Marks-Larsen case which was interrupted by the defendants herein. It was practical and logical that that case

be tried before the instant case. See 27 C.J.S. pp. 443, 445, 450. That trial ended March 6, 1980, which was followed by the petitioner seeking writ of mandamus concerning a verdict found after the jury was discharged which the court accepted, and based upon it ordered a mistrial. As soon as practical, the petitioner proceeded in discovery. In March, 1980, the petitioner submitted interrogatories to Fry which he refused to answer. He refused to appear for deposition in June, 1980. Requests for admission submitted in July, 1980 were all unanswered. Subpoena was served upon another witness. Then on December 3, 1980, the defendants appeared before the Court in an ex parte hearing to seek protective orders. It was without notice and there was no showing why the hearing was

necessary, much less ex parte. They had already submitted objections to the discovery. The Court ordered stay of all discovery, which order the petitioner did not receive until after hearing concerning motions for summary judgment on December 12, 1980. Summary judgment for defendants was ordered. (Appendix A, pages A-133 through A-147)

Even without the denied discovery, and even without depositions of defendants and co-conspirators taken in related cases incorporated herein by petitioner's affidavit, it is submitted that affidavits and unanswered requests for admission were sufficient to overcome motions by defendants for summary judgment. The aforementioned depositions were wrongfully excluded from the record by the trial Court and Appeals Court. The clerk of the trial Court, in

apparent anticipation of the exclusion later requested and ordered later had not transmitted another designated portion of the record which included parts of those depositions. The trial Court had nothing but some insufficient self-serving affidavits of the defendants and their confederates upon which to base its facts found. The refuting and conflicting sworn testimony taken in a related case concerning the issues of this case were excluded and the petitioner was not allowed to cross-examine the affiants in conflict with Parrish v. De Remer, supra, and with Conley v. Gibson, supra. Counsel for defendants herein represented Fry during his deposition in the related case, and represented the members of the Risk Management Committee except for Brittain. For his deposition in the Marks case,

Brittain was represented by other counsel employed by Hartford. Brittain admitted the publications alleged and had interpreted the letter, Exhibit A of the complaint, as a "scathing indictment of Dr. Tyler's behavior in an emergency room situation." He admitted doing nothing to determine if the content of the letter was true or not prior to his republishing it. Fry admitted that medical records were in the files without consent of patients. Those medical records are presumed to be the same as ones blatently produced at the Marks trial which failed to discredit the petitioner, but revealed that in their attempted entrapment that lives of patients were deliberately placed in jeopardy to antagonize the petitioner. Brittain and other members of the committee admitted in their depositions that their only interest

in medical records they requested to examine was for hypothetical legal purposes. Except for being sued for malpractice, none of the committee members had expertise in law. They all admitted that they had not determined that the petitioner was an increased insurance risk. They made their recommendation that his insurance not be renewed because he did not grant them permission to examine all of the hospital medical records of all patients cared for therein by him. A copy of their recommendations was never sent the petitioner and was denied him in discovery in conflict with the mandatory requirement of C.R.S. 12-43.5-102 (3)(b)(II)(c) supra. It is submitted that that recommendation is libelous and subject to the 3rd, 4th, and 5th claims for relief.

Federal Issues Presented

Federal issue of claim under 42 U.S.C. § 1983 was presented in the complaint. In memorandum on June 26, 1980, in response to defendants' motion for summary judgment, the petitioner designated a "Notice of Constitutional issues." It included claims: (1) that defamation concerning his profession by the defendants deprived him of property and liberty protected by the 14th Amendment of the U.S. Constitution; (2) dismissal of the 3rd and 4th claims deprived him of the property right of trial for damages protected by the 14th Amendment; (3) that without due process of law in violation of the 14th Amendment the defendants deprived the petitioner of the valuable right and liberty to practice medicine without unlawful interference; (4) that denial of discovery of documents published

to Brittain by Fry and Hartford deprived the petitioner the right to a fair trial protected by the 14th Amendment; and (5) that the 14th Amendment guaranteed the petitioner equal protection of the law and due process of law requiring that the decision of the Gaylor case not be cited as precedent in the instant case.

The foregoing claims of federal issues were not addressed by the Colorado Courts. On appeal subject of this petition, the petitioner referred to the record of the foregoing notice of Constitutional issues. Added to those was the claim of denial of right to trial of the issues of this case and by jury without due process of law. It was submitted that the petitioner's rights guaranteed by the 5th, 9th, and 14th Amendments of the U.S. Constitution were violated. In his petition to the Colorado Supreme Court for writ of certiorari, it was

submitted that he had been deprived of rights protected by the 1st, 9th, and 14th Amendments of the U.S. Constitution without due process of law. The Colorado Courts only ruled on the issues of the 4th claim for relief based upon 42 U.S.C. § 1983 and dismissed it by finding no state action and no Constitutionally protected rights involved.

The defendants herein joined a conspiracy in progress which involved the petitioner's right to practice medicine in Brighton Community Hospital, and its deprivation without due process of law. The complaint in that action, published by Fry and Hartford to Brittain contained such a claim based upon 42 U.S.C § 1983. The hospital was a public community hospital, leased by the city and subleased to the Brighton Community Hospital Association. In attempt to preserve rights protected by the 14th Amendment, the By Laws

of the Medical Staff, Art. III, 2 provided:

> All rights under the constitutions of the United States, Colorado and the laws of the State of Colorado and the United States apply and are available to the members of the staff of this hospital and specifically in reference to their practice in this hospital and membership in the Medical Staff.

Those by laws were incorporated in the complaint in the instant case along with the municipal ordinances providing for the lease and operation of the Brighton Community Hospital.

REASONS FOR GRANTING THE WRIT

The right to trial for damages from intentional torts as herein was established in the common law as an essential right long before the founding of this republic. BLACKSTONE: Commentaries on the Laws of England, Vol. I, pp. 141, 144. The Colorado Courts have clearly deprived the petitioner of his common law, Constitutionally

protected, property right of trial for damages without due process of law. Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., supra. Unless this Court grants this writ, courts of the State of Colorado are closed to this petitioner and to anyone else in the choosing of their judges.

Collateral estoppel was applied without adherence to procedural and substantive due process of law. Its application was not in accord with at least one decision by this Court. County of Mobile v. Kimball, supra. It was not in accord with decisions of federal courts. William Whitman Co. v. Universal Oil Products Co., supra; Missouri Utilities Co. v. City of California, supra.

The right and liberty of security in one's reputation is well established in the common

law. BLACKSTONE, supra pp. 133-134. The petitioner has been deprived without due process of law his property right to trial for damages for defamation and for its effect upon his property right of practice of medicine. This has been done under color of a decision of this Court, but not in accord with that decision, Gertz v. Welch, supra. There is a need for this Court to clarify its dictum in that case which appears to allow defamation of private persons if it is an expression of opinion. See 76 Col. L. Rev. 1205 (1976). The Colorado Courts have shown as herein that any defamation can be labeled "an opinion." The allowing without being liable for damages from defamation by such means violates the common law, the 7th Amendment, and the Fourteenth Amendment.

The character of physicians in organization-inspired bravado to vilify their colleagues,

competitors, and particularly innovators is well documented and has not changed in the period of recorded history. It even included the vilification of Jesus Christ. Matthew, 12:8-24. At no time before in history has organized medicine had the total unfettered power it has at this time, backed by the State and Federal governments, demonstrated in this case, to prevent well qualified physicians from practicing their chosen profession. This power has been directed particularly against those who have the ability and desire to improve medical care by change.

The petitioner has been deprived his right to practice medicine in a public community hospital without due process of law. Whether or not this right is protected by the 14th Amendment is of vital importance

to the security of physicians and their patients in this nation. Hospitals are of public interest and Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 is applicable. Reitman v. Mulkey, 387 U.S. 369, 18 L.Ed. 822, 87 S.Ct. 1627. Other states' courts and federal courts in circuits other than the Tenth have ruled that the practice of medicine in public and other hospitals is protected by the 14th Amendment. Holmes v. Silver Cross Hospital of Joliet, Illinois, 340 F.Supp. 125 (N.D.Ill.E.D.1972); Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302 (1974); Sams v. Ohio Valley General Hosp. Assoc., 413 F.2d 826 (4th Circ 1969); Citta v. Delaware Valley Hosp., 313 F.Supp. 301 (E.D.Pa.1970); Eaton v. Grubbs, 329 F.2d 710 (4th Circ, 1963);

Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Circ., 1963), cert den. 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659; Suckle v. Madison Gen. Hosp., 362 F.Supp. 1196 (W.D. Wisc, 1973).

The defendants herein joined the conspiracy in progress which deprived the petitioner without due process of law of his right to practice medicine in a public hospital and are thereby responsible. Shirley v. State Nat'l Bank of Connecticut, 493 F.2d 739 (2nd Circ, 1974); U.S. v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267.

The Colorado Courts' decision that the petitioner did not have a Constitutionally protected right to be free of harassment, oppression, and intimidation in his practice of medicine by the defendants herein acting under color of state statutes

in a committee of the state medical society is not in accord with decisions of this Court. Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623; Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796; See Adler v. Montefiore Hosp. Assoc. of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634. The amount of damage inflicted is a matter of fact for the jury.

The Colorado Courts' decision that there was no state action here under 42 U.S.C. § 1983 because the State statutes involved did not compel the defendants to act in their unlawful ways is not in accord with decisions of this Court. U.S. v. Classic, supra; Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473. There is an apparent wide disparity in rights

guaranteed by the U.S. Constitution and their support and enforcement. It is submitted that the petitioner presents a need for the protection for which the Amendments of the Constitution were designed to provide in a matter that is of great importance to all physicians in this natiton and to the public whom they serve.

The dismissal of the 3rd claim for damages due to unlawful interference with practice of medicine and by conspiracy was not in accord with decisions of this Court and with decisions of other federal courts. Duplex Printing Press Co. v. Deering, supra; Pettibone v. U.S., supra; Alaska SS. Co. v. Internat'l Longshoremen's Assoc., supra; Dextone v. Building Trades Council, supra;

Am. Tobacco Co. v. U.S. supra.

Denial of discovery was not in accord with decisions of this Court and with decisions of other federal courts. Conley v. Gibson, supra; Udemstock v. Am. Mortg. & Invest. Co., supra; Slagle v. U.S., supra; U.S. v. Kelsey, supra; Connecticut Mutual Life Ins. Co. v. Shields, supra; D'Ippolito v. Cities Service Co., supra; Philadelphia Electric Co. v. Anaconda American Brass Co., supra; B & C Trucking Co. v. Holmes & Narver, Inc., supra; Doughtery v. Gellethin, supra.

The petitioner submits that he has a right to trial for damages as to each and all of his 5 claims for relief. Petitioner submits that he has a right to discovery which has been denied him.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 14, 1982

APPENDIX A

COLORADO COURT OF APPEALS

No. 81CA0157

DONALD E. TYLER,	)	
	)	NOT
Plaintiff-Appellant,	)	
	)	SELECTED
v.	)	
	)	FOR
THE HARTFORD INSURANCE	)	
	)	PUBLICATION
GROUP, FRANCIS FRY, and	)	
	)	
ROBERT S. BRITTAIN,	)	

Defendants-Appellees.

Appeal from the District Court of Jefferson County

Honorable Anthony F. Vollack, Judge

DIVISION II

Opinion by JUDGE KELLY

Van Cise and Tursi, JJ, concur

JUDGMENT AND ORDERS AFFIRMED

Donald E. Tyler, Pro se

Pryor, Carney and Johnson, P.C.

Peter Pryor

Thomas L. Roberts

Englewood, Colorado

Attorneys for Defendants-Appellees

Opinion filed and judgment entered on the 31st of December 1981, Clerk of the Court, Mac Danford.

Plaintiff Dr. Donald Tyler, sued defendants, The Hartford Insurance Group (Hartford), Francis Fry, and Dr. Robert Brittain, for libel, slander, outrageous conduct, civil conspiracy, and violation of 42 U.S.C. §1983. In December, 1977, the trial court dismissed the conspiracy and civil rights claims, and in January 1981, the trial court granted summary judgment in favor of defendants on the libel, slander, and outrageous conduct

claims. Plaintiff appeals these trial court rulings and assigns error to other rulings denying discovery. We affirm.

On July 3, 1974, Donald Gaylor wrote a letter to Dr. Galen Marks, the chief of staff of Brighton Community Ho spital (BCH). In the letter, Gaylor described an incident in which he had brought his aunt into the emergency room at BCH and the emergency room physician, Tyler, had refused to treat her. On the same day, Gaylor sent an identical letter to Dale Alter, chairman of the board of directors at BCH. The Risk Management Committee at BCH discussed the letter and asked Tyler to produce various medical records for review by the committee. Tyler refused several requests to produce the records and was subsequently removed from emergency room duty. Tyler's

malpractice insurance carrier, Hartford, also requested a review of Tyler's records, and when he refused to provide them, his malpractice insurance was not renewed.

Tyler sued Gaylor, Marks, and various BCH officials for libel, conspiracy and denial of constitutional rights. In Tyler v. Gaylor (Colo. App. No. 77-894, June 14, 1980) (Not selected for official publication), we held that the letter from Gaylor to Alter was nondefamatory and nonactionable as a matter of law. A jury verdict in favor of defendants Gaylor and Alter on the conspiracy claims was affirmed.

I. Libel and Slander

It is uncontroverted that Fry, a medical malpractice claims examiner working for Hartford, showed the Gaylor-Marks letter and other documents associated with pending

Tyler litigation to Brittain, who was then the chairman of the Professional Liability Committee of the Colorado Medical Society. Fry's duties as a Hartford employee included review of lawsuits against doctors insured by Hartford. Brittain's responsibilities included review of hospital records and education of doctors to prevent malpractice claims.

Tyler asserts that Fry's publication to Brittain of the Gaylor-Marks letter constituted libel, and their subsequent discussion of the letter and other documents constituted slander. The trial court noted that the Gaylor-Marks letter, which is the subject of this litigation, is identical to the Gaylor-Alter letter, which was the subject of Tyler, v. Gaylor, supra, except for the difference in the addressee and the lack of signature on the Alter letter. The trial court

held that collateral estoppel prevented relitigation of the issue whether the Gaylor-Marks letter was defamatory. We agree.

All of the criteria for the application of the doctrine of collateral estoppel announced in Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973) are present here. First, the issue decided in the prior adjudication is identical with the one presented in the action in question. Second, there has been a final judgment on the merits in the first case. In Tyler v. Gaylor, the Colorado Supreme Court denied Tyler's petition for certiorari on October 9, 1979. Third, the party against whom the plea is asserted, Tyler, was a party to the prior adjudication. It is irrelevant that the defendants were not parties to the prior action. Murphy v. Northern Colorado Grain Co., 30 Colo. App.

21, 488 P.2d 103 (1971). And fourth, the party against whom the plea is asserted has had a full and fair opportunity to litigate the issue in the prior adjudication. Tyler had both the incentive and the opportunity to litigate the question fully: He presented evidence to the jury on the defamation issue and appealed the jury verdict.

Consequently, collateral estoppel applies to preclude Tyler from asserting that the Gaylor-Marks letter is defamatory. Since the defendants could not be guilty of libeling or slandering plaintiff by publishing a nondefamatory statement, Tyler's first and second claims must fail.

Tyler asserts that his complaint included the allegation that documents other than the Gaylor-Marks letter were published to Brittain. However, the Gaylor-Marks letter

is stressed in Tyler's complaint, and the only other documents mentioned by Tyler are his own pleadings and requests for admissions in the prior cases. Such documents, authored by Tyler himself, cannot be the basis of a defamation claim. See Restatement (Second) of Torts § 558.

II. Outrageous Conduct

Tyler asserts that Fry's publication to Brittain of the subject documents constituted outrageous conduct, which caused him severe emotional distress. However, there is liability for outrageous conduct "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753

(1970), citing Restatement (Second) of Torts §46(1), Comment d (1965).

"It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. ..." Blackwell v. Del Bosco, 35 Colo. App. 399, 536 P. 2d 838 (1975), aff'd , 191 Colo. 344, 558 P. 2d 563 (1976). We agree with the trial court's determination that the Gaylor-Marks letter, which does not contain profane or insulting language, cannot be considered outrageous under the Rugg standard. See Meiter v. Cavanaugh, 40 Colo. App. 454 580 P. 2d 399 (1978).

III. Anticipatory Breach and Conspiracy

In his third claim for relief, Tyler attempted to allege numerous causes of action arising out of an anticipatory breach

of his insurance contract with Hartford, conspiracy to breach that contract, and conspiracy to interfere with his practice of medicine. Although Hartford warned Tyler that it would not renew his malpractice insurance if he failed to cooperated with the Risk Management Committee, that action was not an anticipatory breach of contract. Under § 10-4-109, C.R.S. 1973 (1980 Cum. Supp.), an insurer is required to provide to the insured sixty days' advance notice of its intention not to renew.

Moreover, failure to renew a contract does not constitute a breach when there is no provision in the contract for automatic renewal. Hartford did not cancel Tyler's contract, but merely failed to renew it when Tyler refused to cooperate with its investigation. While § 10-4-109, C.R.S. 1973 (1980 Cum. Supp.)

prescribes the manner in which a medical malpractice insurer must effect a nonrenewal, the statute does not require renewal. Since there was no breach of the insurance contract, the trial court correctly dismissed Tyler's claim of conspiracy to breach the contract.

In an action for civil conspiracy, the plaintiff must establish that two or more persons, with an object to be accomplished, came to a meeting of the minds concerning that object, and performed one or more unlawful acts which resulted in damages. Lockwood Grader Corp. v. Bockhaus, 129 Colo. 339, 270 P.2d 193 (1954). Tyler asserts that defendants conspired to interfere with his practice of medicine by intimidating him to betray the confidences of his patients and by depriving him of his medical malpractice insurance coverage. However, the

investigation conducted by the Risk Management Committee was sanctioned by § 12-43.5-101, C.R.S. 1973, which provides for committees of physicians to review the conduct of practice by other doctors in order to encourage discipline and control of the practice of health care. Hartford's investigation into Tyler's practice, and its subsequent nonrenewal based on Tyler's failure to cooperate, were not unlawful acts that could be the basis for civil conspiracy.

IV. 42 U.S.C. § 1983

Tyler alleged that defendants, acting under color of state law, conspired to deprive him of rights protected by the Fourteenth Amendment. He theorized that the defendants acted under color of state law because they acted pursuant to municipal ordinances of Brighton and § 10-4-109, C.R.S. 1973 (1980

Cum. Supp.), the insurance nonrenewal statute, and as members of the Colorado Medical Society.

The following elements are required to maintain a conspiracy claim under 42 U.S.C. § 1983: The defendants must have conspired together, acted under color of state law, deprived the plaintiff of a federal right, and committed overt acts pursuant to the conspiracy which caused damage to the plaintiff. Espinoza v. O'Dell, ___Colo.___, 633 P.2d 455 (1981).

Tyler had no federal or constitutional right to have his malpractice insurance renewed. No Colorado law requires a physician to maintain professional liability insurance coverage as a condition precedent to practicing medicine in this state. Moreover, simply following local ordinances and state

laws does not constitute state action for purposes of 42 U.S.C. § 1983 unless a state statute compels a private party to act in a certain way. Since the state did not mandate or otherwise compel defendants to consider nonrenewal of Tyler's policy, there is no basis for concluding that defendants acted under color of state law.

V. Discovery

Tyler cites Miller v. First National Bank, 156 Colo. 358, 399 P.2d 99 (1965), for the proposition that the trial court improperly denied his discovery motions. In Miller, summary judgment was reversed because the trial court had abused its discretion in refusing to grant Miller a continuance to permit discovery. However, Miller had no opportunity to conduct discovery. Tyler had nearly three years to conduct discovery but failed to exercise the opportunity in any

meaningful way until after defendants had filed a second motion to dismiss for lack of prosecution. Under these circumstances, the trial court's stay of discovery until after its consideration of the motion for summary judgment was not an abuse of discretion.

We have examined Tyler's other contentions of error and find them to be without merit.

The trial court's judgment and orders are affirmed in all respects.

JUDGE VAN CISE and JUDGE TURSI concur.

IN THE COURT OF APPEALS OF THE

STATE OF COLORADO

Case Number 81CA0157

DONALD E. TYLER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs	)	
	)	ORDER
THE HARTFORD INSURANCE	)	
	)	
GROUP, FRANCIS FRY, and	)	
	)	
ROBERT BRITTAIN,	)	
	)	
Defendant-Appellees.	)	

Upon consideration of the Petition for Rehearing filed by the appellant herein, said petition is hereby Denied. Unless otherwise ordered, mandate will issue Feb 4, 1982.

BY THE COURT,

Dated: Jan. 28, 1982

IN THE SUPREME COURT OF THE

STATE OF COLORADO

No. 82 SC 80 January Term, 1982

DONALD E. TYLER,	)
	) Certiorari to
Petitioner,	)
	) the Colorado
vs.	)
	) Court of Appeals
THE HARTFORD INSURANCE	)
	) No. 81CA0157
GROUP, FRANCIS FRY, and	)
	)
ROBERT S. BRITTAIN,	)
	)
Respondents.	)

ON PETITION FOR WRIT OF CERTIORARI

to the Court of Appeals.

After review of the record, the briefs and

the opinion of the Court of Appeals,

IT IS ORDERED by this court that said

petition be, and the same hereby is, denied.

MARCH 29, 1982 By the Supreme Court
Sitting En Banc

(Court Seal)

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 77CV0782, Div. 4

Donald E. Tyler,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	COMPLAINT
	)	
The Hartford Insurance Group,	)	
	)	
Francis Fry, Robert S. Brittain,	)	
	)	
DEFENDANTS	)	

Plaintiff complains of defendants The Hartford Insurance Group, Francis Fry, and Robert S. Brittain and each of them and for cause of action alleges:

FIRST CLAIM FOR RELIEF

1. At all times mentioned herein, the plaintiff Donald E. Tyler was licensed to practice medicine and surgery in Colorado and was Admitted to the Bar of the State of Colorado.

2. At all times mentioned herein defendant Francis Fry was an employee and agent of defendant The Hartford Insurance Group and was acting in that capacity for Hartford Insurance Group and within the scope of his employment.

3. At all times mentioned herein Robert S. Brittain was and is a resident of Jefferson County.

4. On or about June 15, 1976, in Denver, Colorado, in offices of defendant Hartford Insurance Group, defendant Fry did publish various writings to defendant Robert S. Brittain including but not limited to a letter addressed to Galen Marks which is annexed hereto and labeled EXHIBIT A and is included by reference as a part of this paragraph, and other letters making the same statements.

5. Aforementioned writings on the face

imputed and stated and meant without any explanation by innuendo that the plaintiff acted and spoke unprofessionally in conduct of his practice of medicine and surgery, and were libelous per se.

6. Furthermore, by innuendo the aforementioned writings meant to persons reading them including Robert S. Brittain that the plaintiff acted improperly in conduct of his practice of medicine and surgery, and were defamatory and libelous.

7. Aforementioned writings, and by innuendo, are and were false.

8. Aforementioned publications were made by defendants Fry and Hartford Insurance Group and each of them to lower the reputation of the plaintiff, to humiliate and subject him to ridicule, and in other ways damage him.

9. Aforementioned publications were made

with a knowledge of their falsity and in reckless disregard of whether they were true or not.

10. Aforementioned publications were made negligently.

11. Aforementioned publications were made maliciously, willfully, wantonly, and in reckless disregard for the rights and feelings of the plaintiff.

SECOND CLAIM FOR RELIEF

12. Paragraphs 1 through 11 are incorporated herein by this reference.

13. Defendant Brittain republished aforementioned written statements by way of oral communications to various persons known to defendants and unknown to plaintiff including but not limited to Wilfred Stedman, Herbert Rothenberg, James Henderson, and Carl H. McLauthlin.

14. Defendants F ry and Hartford are responsible with Brittain for aforementioned republication.

15. The time and place of such communications are known to defendants; to knowledge and belief of plaintiff they occurred in 1976 and 1977, since June 15, 1976, and in various places in Colorado including Arapahoe County.

16. Aforementioned publications were defamatory, and imputed improper conduct and conduct hazardous to the public and others by Donald E. Tyler and in his practice of medicine and surgery.

17. Aforementioned publications were understood by the persons hearing them aforementioned as stating that the plaintiff conducted his practice of medicine and surgery improperly and unprofessionally.

18. Aforementioned publications were and

are false.

19. Aforementioned publications were made to lower the reputation of the plaintiff, to humiliate and subject him to ridicule and in other ways damage him.

20. Aforementioned publications were made negligently, maliciously, willfully, and wantonly and in reckless disregard for the rights and feelings of the plaintiff.

21. Aforementioned publications were made with knowledge of their falsity and in reckless disregard of whether they were true or not.

THIRD CLAIM FOR RELIEF

22. Paragraphs 1 through 21 are incorporated herein by this reference.

23. By way of the foregoing and in other ways herein described the defendants and each of them have conspired and continue to conspire with each other and with other persons

including but not limited to Galen Marks, Robert Larsen, Wilfred Stedman, Herbert Rothenberg, James Henderson,Carl McLauthlin, Orrel Daniel, John Vowell, Brighton Community Hospital Association, to unlawfully and wrongfully interfere with and obstruct the lawful practice of medicine and surgery by the plaintiff which is continuing, and to monopolize and control the practice of medicine and surgery in an area including Brighton and Fort Lupton, Colorado, and to wrongfully and unlawfully eliminate competition, to the detriment of the plaintiff, and the defendants and each of them have committed and continue to commit various acts hereinafter described and listed which have resulted and continue to result in unlawful elimination of competition and in unlawful interference with the professional practice of medicine and

surgery by the plaintiff.

24. The defendants and each of them have conspired with each other and with others and have acted wrongfully and unlawfully to coerce and intimidate the plaintiff to betray and breach the confidences of his patients, the ethics of his profession, and contracts with his patients and specifically by forcing, coercing and oppressing him to consent to the examination of the medical records of his patients without their consent.

25. The defendants and each of them have conspired to and have acted oppressively, wrongfully and maliciously to damage the insurability of the plaintiff, a valuable right, and without notice, hearing, or due process of law for purposes of the foregoing,and in furtherance of aforementioned conspiracy.

26. At all times mentioned herein, the

defendants and each of them had and have knowledge of an insurance contract for professional liability existing between plaintiff and defendant The Hartford Insurance Group and an expectancy by plaintiff and right by agreement and laws of the State of Colorado of renewal of such.

27. At all times mentioned herein, the defendants and each of them had knowledge of contracts and business relations between Warren & Sommer, Inc. and the plaintiff.

28. The defendants and each of them have conspired with each other and with other persons wrongfully, unlawfully, and in bad faith to induce breaches of aforementioned contracts and to breach aforementioned contracts and have caused damage in business relationships and have induced Hartford Insurance Group and Warren &

Sommer, Inc. to cease doing business with the plaintiff and to breach the aforementioned contracts. Notice of such is appended as EXHIBIT B.

29. The defendants and each of them have in the foregoing and in other ways harassed and annoyed the plaintiff and have written and caused to be written various letters for these purposes and for purposes of insult, abuse, and to injure his feelings, and for purposes of the aforementioned conspiracy.

30. At all times mentioned herein By Laws of the Medical Staff of Brighton Community Hospital (BCH), a true and correct copy of which are annexed hereto as EXHIBIT C, were in effect subject to dates of amendments included from November 2, 1973, through December 31, 1974.

31. At all times mentioned herein Rules and Regulations of the Medical Staff of BCH, a

true and correct copy of which are annexed hereto as EXHIBIT D, were in effect from November 2, 1973, through December 31, 1974.

32. The defendants and each of them have conspired to and have committed and continue to commit and are responsible for the following acts which have been committed in Brighton, Colorado:

(a) Wrongful treatment of a minor patient in 1974 by Robert Larsen and BCH in 1974 without consent of parents to detriment of plaintiff;

(b) Aiding and abetting the practice of medicine and surgery by persons unlicensed to practice such in 1974;

(c) Abuses of purposes of committees of the Medical Staff of BCH by using them for unauthorized, wrongful and unlawful purposes, including but not limited to their use to attempt to force the plaintiff to submit his x-rays for

examination by others to his detriment and to insult and humiliate him and to the detriment of his patients in February and March, 1974;

(d) The non-reporting and false reporting of its activities to the medical staff by the members of the executive committee of the Medical Staff of BCH and those acting with it in 1973 and 1974;

(e) The untimely scheduling of a disciplinary corrective action hearing concerning and against the plaintiff without charges, without written request, without notice or without adequate notice, without jurisdiction, and without due process of law; the deciding of issues subject to hearing without hearing; the decreasing of the plaintiff's privileges in BCH including removal from emergency room call without charges, notice or hearing, without authority, or jurisdiction, and without due

process of law or equal protection of the law in 1974;

(f) Making a sham requirement of filing an application for appointment a requirement for reappointment of the plaintiff to the Medical Staff of BCH without authority, without jurisdiction, and without equal protection, and denial of reappointment of plaintiff to the Medical Staff of BCH without recommendation by the Medical Staff in 1974 and 1975;

(g) Failure to record minutes of meetings and falsification of records of committees of the medical staff of BCH in 1974;

(h) Inducement of breaches of contract between the plaintiff and Brighton Community Hospital Association and between the plaintiff and his patients in 1974 and continuing:

(i) Treatment of patients of other physicians without adhering to the principles of ethics of

the AMA, and coercion and intimidation to force the plaintiff to treat patients of other physicians without adhering to the principles of ethics of the AMA and denial of his right to treat whom he chooses in 1974 and continuing;

(j) Abusive, oppressive, coercive, insulting and damaging statements by John Vowell, William Waddell, and Gwen Stieber, and abusive, insulting and damaging written publications by John Vowell, Galen Marks, and others in 1974;

(k) Abuse, insult, and denial of equal rights and equal protection under the law by withholding an application form from plaintiff for purported but sham purpose of evaluation for reappointment to the medical staff, and later providing one on an unequal basis with other staff members of BCH in 1974;

(l) Deprivation of plaintiff of Emergency

Room call schedules, a valuable property, without due process and without jurisdiction or authority in November and December, 1974;

(m) Decrease of privileges in BCH of Donald Fern, D.O., without charges, notice, hearing, or due process of law in December 1973, January and February 1974;

(n) Denial of reappointment to the Medical Staff of BCH of Donald Fern, D.O., without charges, notice, hearing, or due process, and without recommendation by the medical staff in 1974 and 1975 and continuing;

(o) Decrease in the privileges in BCH of Merrill Shidler, M.D., without charges, notice, hearing, due process, and without authority or jurisdiction in 1975;

(p) Decrease in the privileges in BCH of Buel Hutchinson, M.D., without notice or hearing, without due process of law, and in breach of the By Laws of the Medical Staff of

BCH in 1976;

(q) Breach of fiduciary duty to recommend plaintiff for membership to the medical staffs of other hospitals in 1974, 1975 and continuing, thereby black-listing the plaintiff.

33. The foregoing acts were all done and continue to be done in bad faith, arbitrarily, capriciously, unreasonably, in breach of fiduciary duties, contracts and agreements, and in breach of the By Laws, Rules and Regulations of the Medical Staff of BCH.

34. By the unlawful and wrongful acts, methods, means and ways aforementioned the defendants and each of them have and continue to wrongfully and unlawfully interfere with and obstruct the practice of medicine and surgery of the plaintiff.

FOURTH CLAIM FOR RELIEF

35. Paragraphs 1 through 34 are

incorporated herein by this reference.

36. At all times mentioned herein until April, 1975, ordinances of the municipality of Brighton, Colorado, numbered 421, 422, 423, and 424 annexed hereto as EXHIBITS E, F, G, and H were in effect.

37. The right to practice medicine and surgery in Brighton Community Hospital at all times mentioned herein was and is protected by the Constitution of the United States of America by agreement by the aforementioned By Laws.

38. The defendants and each of them committed the foregoing acts under color of the aforementioned ordin ances of the municipality of Brighton, Colorado, and the State of Colorado.

39. At all times mentioned herein defendant Robert S. Brittain and co-conspirators

Stedman, Rothenberg and Henderson were members of the Risk Management Committee of the Colorado Medical Society and were acting under color of that office.

40. The defendants and each of them and their co -conspirators committed the foregoing acts and conspiracies under color of CRS, 1973, 10-4-109 amended.

41. The defendants and each of them have conspired to and have deprived the plaintiff of valuable rights protected by the Constitution of the United States and the 14th Amendment thereto without due process of law and without equal protection of the law.

FIFTH CLAIM FOR RELIEF

42. Paragraphs 1 through 41 are incorporated herein by this reference.

43. The foregoing acts were and are outrageous and they were and are being

committed for the purposes of coercion, intimidation, abuse, insult and to intentionally cause the plaintiff mental suffering, anxieties and severe emotional distress.

ALLEGATIONS CONCERNING EACH CLAIM FOR RELIEF IN THE ALTERNATIVE AND JOINTLY

44. As a direct and proximate result of the foregoing the plaintiff has suffered and continues to suffer loss of time, loss of income, loss of earning capacity, damage to his professional reputation, damage to his professional insurability, breach of valuable contracts and other special damage. Such special damage is permanent and continuing and the exact amount is unascertainable at this time and plaintiff prays leave to insert the amount herein when it is ascertained.

45. As a direct and proximate result of the foregoing the plaintiff has suffered and

continues to suffer worries, mental suffering, severe emotional distress, and such are expected to continue, and other general damage in amount of five million dollars.

46. The acts related in each of the foregoing claims for relief were committed oppressively, willfully, wantonly and maliciously, and in reckless disregard for the rights and feelings of the plaintiff.

47. The plaintiff is being irreparably and permanently injured and damaged; this damage is continuing and increasing with time; multiple suits will be required unless the issues are promptly resolved; and legal relief is inadequate.

WHEREFORE, plaintiff prays for relief as follows:

1. Special damages;

2. General damage in the amount of five

million dollars ($5,000,000.00;

3. Punitive damages in the amount of fifteen million dollars ($15,000,000.00);

4. Costs of suit;

5. Early trial of this matter.

Dated: April 25, 1977 By: (signed) D. E. Tyler

Donald E. Tyler
Attorney for Plaintiff
1790 East Bridge Street
Brighton, Colo 80601
telephone 659-4581
Supreme Court Regis
#001401

PLAINTIFF DEMANDS A JURY TRIAL OF THE ISSUES HEREIN

gaylor's FOOD STORE, INC.

540 Bridge Street . Brighton, Colo

July 3, 1974

Dr. Galen Marks

Chief of Staff

Brighton Community Hospital

Dear Galen:

On Thursday June 27th, 1974 at approximately 5:30 PM I brought my Aunt Miss Margaret Schroer to Brighton Community Hospital for emergency treatment. She received a bad cut on her leg from a lawn mower accident which needed medical attention. The action taken by Dr. Tyler who was on duty was very distressing to me, my family and friends. After discussion with Dale Alter I am writing this letter to the Board and Chief of Staff asking that the situation be reviewed and corrected.

EXHIBIT A

The decision by Dr. Tyler was that my Aunt Miss Schroer should seek medical attention elsewhere because she was not and probably would not be a patient of his. The whole discussion and situation was very unprofessional and is not in my opinion the reason for which Brighton Community Hospital was built. It is my feeling that the Hospital was built to serve all citizens of the Brighton area and in particular admister emergency treatment to anyone regardless of who they are and regardless of who there Doctor is.

This type of situation can only hurt the Image of Brighton Community Hospital and I support action to correct what I feel is the wrong approach in dealing with people who need attention and the service of Brighton Community Hospital,

Sincerely,

(signed) Donald B. Gaylor

Donald G. Gaylor

WARREN & SOMMER INCORPORATED

SUITE 500/3855 EAST EXPOSITION

DENVER, COLORADO 80209

TELEPHONE 303-744-3711

March 29, 1977

Donald E. Tyler, M. D.

1790 E. Bridge Street

Brighton, Colorado 80601

Dear Dr. Tyler:

On November 1, 1976, the Risk Management Committee of the Colorado Medical Society requested permission to look at your medical records. On November 28, 1976, Dr. Robert S. Brittain received a supoena from you requesting a deposition from your attorney. This deposition was carried out on January 4, 1977 and, following that deposition, Dr. Brittain advised your attorney that the Risk Management Committee would still want

permission to examine your ER records.

As of March 28, 1977, the Risk Management Committee has not received your permission to review your records. I would like to point out that the Risk Management Committee has reviewed (with the doctor's permission) many doctors records in Colorado.

Your professional Liability coverage is due for renewal on December 11, 1977, and this is to advise you we will be unable to offer renewal of the Professional Liability coverage because of your failure to cooperate with the Risk Management Committee of the Colorado Medical Society.

Should you have any questions, please do not hesitate to give me a call.

Sincerely,

(signed) Bill Buck---

William M. Buckman

Vice President

WMB/jg

cc: Wilfred Stedman, M.D.
Robert S. Brittain, M.D.
Thomal Mitchell, Hartford

ONE OF THE SEVENTY WORLDWIDE

OFFICES OF ASSUREX INTERNATIONAL

INSURANCE BROKERS

(Exhibit C consists of 27 type written pages. Its pertinent parts are excerpted herein)

BY LAWS OF THE MEDICAL STAFF OF BRIGHTON COMMUNITY HOSPITAL

PREAMBLE ...

ARTICLE III: SUPREMACY OF LAW

1. The constitution of the United States and the State of Colorado, the laws of the United States and the State of Colorado and the laws of the City of Brighton are supreme to any rules, bylaws and constitution of the medical staff of Brighton Community Hospital.

2. All rights under the constitutions of the United States, Colorado and laws of the State of Colorado and the United States apply and are available to the members of the staff of this hospital and specifically in reference to their practice in this hospital and membership

in the Medical Staff.

ARTICLE IV: MEDICAL STAFF MEMBERSHIP

Section 1. Nature of Medical Staff Membership

Membership on the medical staff of Brighton Community Hospital is a privilege which shall be extended only to professionally competent physicians, dentists and podiatrists who continuously meet the qualifications, standards and requirements set forth in these bylaws.

Section 2. Qualifications for Membership.

a. Only physicians, dentists and podiatrists licensed to practice in the State of Colorado shall be qualified for membership on the medical staff. No physician, dentist, or podiatrist shall be entitled to membership on the medical staff or to exercise of particular clinical privileges in the hospital merely by virtue of the fact that he is duly licensed to

practice medicine, dentistry, or podiatry in this or any other state, or that he is a member of any professional organization, or that he had in the past, or presently has, such privileges at another hospital.

b. Acceptance of membership on the medical staff shall constitute the staff member's agreement that he will strictly abide by the Principles of Medical Ethics of the American Medical Association, the Code of Ethics of the Dental Association, or the Code of Ethics of the American Podiatry Association, whichever is applicable, as the same are appended to and made a part of these bylaws.

Section 3. Conditions and Duration of Appointment.

a. Initial appointments and reappointments to the medical staff shall be made by the governing body. The governing body shall

act on appointments, reappointments, or revocation of appointments only after there has been a recommendation from the medical staff as provided in thes bylaws; provided that in the event of unwarranted delay on the part of the medical staff, (exceeding 3 months), the governing body may act without such recommendation on the basis of documented evidence of the applicant's or staff member's professional and ethical qualifications obtained from reliable sources other than the medical staff. (Comment: When acting in the event of an unwarranted delay, the governing body must base its decision upon the same kind of information as is usually considered by the medical staff. For the purposes of this section, unwarranted delay generally means 3 months from the date that the fully completed application has been

received by the medical staff.)

b. Initial appointments shall be for a period extending to the end of the current medical staff year of the hospital. Reappointments shall be for a period of not more than one medical staff year. For the purpose of these bylaws the medical staff year commences on the first day of January and ends on the 31st day of December of each year.

c. Appointments to the medical staff shall confer on the appointee only such clinical privileges as have been granted by the governing body, in accordance with these bylaws.

d. Every application for staff appointment shall be signed by the applicant and shall contain the applicant's specific acknowledgement of every staff member's obligations to read and abide by the medical staff bylaws,

rules and regulations. ...

ARTICLE VI: PROCEDURE FOR APPOINTMENT AND REAPPOINTMENT

Section 1. Application for Appointment.

a. All applications for appointment to the medical staff shall be in writing, shall be signed by the applicant, and shall be submitted on a form prescribed by the medical staff. The application shall contain detailed information concerning the applicant's professional qualifications, and two letters of recommendations by physicians and a letter containing a summation of an interview by an Active Staff member appointed by the acting Chief of Staff.

b. The applicant shall have the burden of producing adequate information for a proper evaluation of his competence, character, ethics and other qualifications, and for

resolving any doubts about such qualifications.

c. The completed application shall be submitted to the Chief Executive Officer, who will within 7 days transmit the application and all supporting materials to the secretary of the Staff for medical staff action, with his written recommendation regarding the application.

d. By applying for appointment to the medical staff, each applicant thereby signifies his willingness to appear for interviews in regard to his application, authorizes the hospital to consult with members of medical staffs of other hospitals with which the applicant has been associated and with others who may have information bearing on his competence, character and ethical qualifications, consents to the hospital's inspection of all records and

documents that may be material to an evaluation of his professional qualifications and competence to carry out the clinical privileges he requests as well as his moral and ethical qualifications for staff membership, releases from any liability all representatives of the hospital and its medical staff for their acts performed in good faith and without malice in connection with evaluating the applicant and his credentials, and releases from any liability all individuals and organizations who provide information to the hospital in good faith and without malice concerning the applicant's competence, ethics, character and other qualifications for staff appointment and clinical privileges, including otherwise privileged or conficential information. ...

3. The application form shall include a

statement that the applicant has received and read the bylaws of the hospital governing body and the bylaws, rules and regulations of the medical staff and that he agrees to be bound by the terms thereof if he is granted membership and/or clinical privileges and to be bound by the terms thereof without regard to whether or not he is granted membership and/or clinical privileges in all matters relating to consideration of his application.

Section 2. Appointment Process.

a. The complete application with recommendations in writing from the chief executive officer shall be presented to the medical staff for initial reading by the secretary of the medical staff at the next regular staff meeting.

b. Second reading shall occur at the following regular staff meeting. At this

time the application shall be approved with clinical privileges as delineated or deferred or disapproved. After final action the application shall be forwarded to the governing body with recommendations by the medical staff.

Section 3. Reappointment Process.

a. At least 90 days prior to the final scheduled Board of Directors meeting in the medical staff year, the executive committee shall review all pertinent information available on each practioner scheduled for periodic appraisal, for the purpose of determining its recommendations for reappointments to the medical staff and for granting of clinical privileges for the ensuing period, and shall transmit its recommendations, in writing to the medical staff. If nonreappointment or a change in clinical privileges is recommended, the reason for

such recommendation shall be stated and documented. The 30 or more days prior to the final scheduled Board of Director's meeting in the medical staff year, the medical staff shall present its recommendations.

b. Each recommendation concerning the reappointment of a medical staff member and the clinical privileges to be granted upon reappointment shall be based upon such member's professional competence and clinical judgment in the treatment of patients, his ethics and conduct, his attendance at medical staff meetings and participation in staff affairs, his compliance with the hospital bylaws and the medical staff by rules and regulations, his cooperation with hospital personnel, his use of the hospital's facilities for his patients, his relations with other practitioners, and his general attitude

toward patients, the hospital and the public. ...

ARTICLE VII: CLINICAL PRIVILEGES

Section 1. Clinical Privileges Restricted.

...(Comment: Applications for additional clinical privileges must be in writing and will be processed in the same manner as applications for initial appointment.) ...

ARTICLE VIII: CORRECTIVE ACTION

Section 1. Procedures

a. Whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the medical staff or to be disruptive to the operations of the hospital, corrective action against such practitioner may be requested by any member of the active staff, by the chief executive officer, or by the governing body.

All requests for corrective action shall be in writing, shall be made to the executive committee, and shall be supported by reference to the specific activities or conduct which constitute the grounds for the request.

b. Whenever the corrective action could be a reduction or suspension of clinical privileges, the executive committee shall schedule a hearing to be held within 30 days. Notice of such hearing shall be given in writing by certified mail with return acknowledgement of receipt prior to 15 days of such hearing.

c. The executive committee shall conduct the hearing and be responsible for making the record of its conduct, findings and recommendations.

d. The executive committee shall submit its report, including its findings and recommendations to the medical staff at its next regular or special meeting.

e. The medical staff may then make recommendations to the governing body. The involved practitioner has a right to a hearing before the governing body prior ...

Section 2. Summary Suspension. ...

ARTICLE X: Committees

Section 1. Executive Committee ...

Section 2. Professional Activities Committee.

a. Composition: The professional activities committee shall consist of the active medical staff.

b. Functions: It shall be responsible for staff functions relating to Medical Records, ... Emergency Room and Out Patient Services,...

c. These functions will be facilitated by subcommittees. ...

d. Subcommittees:

(1) Medical Records Audit Subcommittee: ...

(7) Emergency Room and Outpatient Subcommittee: ...

ARTICLE XII: COMMITTEE AND SUBCOMMITTEE MEETINGS

... Section 5. Minutes ... Each committee and subcommittee shall maintain a permanent file of the minutes of each meeting. ...

AMENDMENT TO BY-LAWS

... 1. Repeal of Article VIII Section1, c, d, e; Section 2, a.

2. Section 1, c, to read as follows:

The executive committee shall conduct the hearing and be responsible for making a verbatim written record of the hearing, its findings, and recommendations. The findings and recommendations shall be mailed to the involved practitioner by certified mail with return receipt or delivered in person to the involved practitioner within 48 hours of conclusion of

said hearing. The involved practitioner and the executive committee shall have the right to the presence and advice of legal counsel.

3. Article VIII, section l, d, to read as follows: The executive committee shall present its report including its findings and recommendations to the medical staff at its next regular or special meeting after 5 days after aforementioned hearing. The medical staff shall not take any action until its following regular or special meeting and not within fifteen days nor later than the next staff meeting after fifteen days after being presented the executive committee report. A hearing de novo shall be held by the medical staff at the written request of the involved practitioner and delivered to the acting president of the medical staff more than five days prior to the meeting designated for acting upon the

executive committee report. At the request of any member of the medical staff, the executive committee shall report to the medical staff the complete verbatim record of its hearing, and the executive committee shall furnish any staff member at his request a complete verbatim written record of its hearings. The involved practitioner and medical staff shall have the right to the presence and advice of legal counsel.

4. Section 1, e, to read as follows:

The medical staff may then make recommendations to the governing body. A vote of at least 2/3 of the active medical staff present shall be required for making any recommendations to the governing body which are adverse or unfavorable to the involved practitioner.

5. Article VIII, Section 2, a, to read as

follows: ... Summary suspension is to be ordered by the Chief Executive officer only when medical care by the practitioner is believed to very seriously immediately jeopardize care of patients. It is to be used sparingly, only to the extent or degree necessary and only when other reasonable and potentially less damaging means cannot be employed to effect the necessary protection of patients. ...

Adopted by the active Medical Staff on March 1, 1974 ....

Approved by the Governing Body on 5-23, 1974

...

RULES AND REGULATIONS OF THE MEDICAL STAFF OF BRIGHTON COMMUNITY HOSPITAL

(This Exhibit D of the complaint consists of 14 single-spaced 8 1/2" by 11" pages. Part is excerpted here)

A. Admissions and Discharge of Patients ...

B. Medical Records ...

F. Emergency Services

1. Policy on Admission of Patient to Emergency Service. ...

2. The Medical Staff will provide Emergency Room care. ...

6. There shall be a monthly review of the Emergency Medical Record by the

Professional Activities Committee to evaluate the quality of emergency medical care. ...

ADOPTED by the active medical staff 6 July, 1973. ...

APPROVED BY THE GOVERNING BODY on July 23, 1973. ...

ORDINANCE NO. 421

(This Exhibit E of the complaint consists of 8 single-spaced, legal size pages. Part is excerpted here)

AN ORDINANCE AUTHORIZING, CONFIRMING LEASING WITH OPTION TO PURCHASE AND SETTING OUT THE TERMS OF SAID LEASE PURCHASE AGREEMENT BETWEEN THE CITY OF BRIGHTON, COLORADO AND THE BRIGHTON DEVELOPMENT COMPANY, A COLORADO CORPORATION, SAID PROPERTY TO BE USED AND OPERATED AS A HOSPITAL, COMMITTING THE CITY TO RENTAL PAYMENTS AS SET OUT IN THIS ORDINANCE, APPROPRIATING MONEY FOR RENTAL PAYMENTS AND DECLARING AN EMERGENCY. ...

The above described property and the improvements thereon to be used as a

public community hospital. ...

It is further understood and agreed that in the event of defaults as herein provided, the City shall remain liable for the balance of the rent herein reserved ... The City agrees to keep the property herein described insured ... The City covenants and agrees to equip, supply and operate said hospital structure as a public and community hospital ... The City may exercise this option and purchase said property for the sum ... ($19,712) on or after April 1, 1975 and until June 1, 1975...

12. All rental payments or purchase payments shall be made by the City from any available City income, lawfully imposed property taxes, , or income from sub-leasing the property for each fiscal year, and the City covenants and agrees, when all other sources of income or revenue are

insufficient in part or in whole, to impose a general levy upon both personal and real property included within the boundaries of the City .... 10th day of November 1959 ... Passed on second and final reading this 24 day of November, A. D. 1959

(signed) J. William Wells

_____

Mayor

ORDINANCE NO. 422

(This Exhibit F of the complaint consists of 7 single-spaced legal sized typewritten pages. Part is excerpted here.)

AN ORDINANCE AUTHORIZING, CONFIRMING, SUBLEASING WITH OPTION TO PURCHASE AND SETTING OUT THE TERMS OF SAID SUBLEASE PURCHASE AGREEMENT BETWEEN THE CITY OF BRIGHTON, COLORADO AND THE BRIGHTON COMMUNITY HOSPITAL ASSOCIATION, SAID PROPERTY TO BE USED AND OPERATED AS A HOSPITAL, AND DECLARING AN EMERGENCY.

... for the promotion of the public order, health, safety, welfare, security, prosperty, and general welfare and good of the people of the City of Brighton, Colorado, and the public in general in order to secure

equipment for and the operation of a public and community hospital. ...

The Sublessee agrees and covenants to staff, operate, equip, supply and maintain said structure as a public and community hospital...

City agrees to pay any and all taxes, if any, which may be lawfully assessed against said hospital property. ...

Passed on second and final reading this 24 Day of November, A.D. 1959.

(signed) J. William Wells

Mayor

ORDINANCE NO. 423

(This Exhibit G of the complaint consists of 9 single-spaced, legal size typewritten pages. Part is excerpted here)

AN ORDINANCE AUTHORIZING, CONFIRMING, LEASING WITH OPTION TO PURCHASE AND SETTING OUT THE TERMS OF SAID LEASE PURCHASE AGREEMENT BETWEEN THE CITY OF BRIGHTON, COLORADO AND THE BRIGHTON DEVELOPMENT COMPANY ... COMMITTING THE CITY TO RENTAL PAYMENTS ...

The above described property and the improvements thereon to be used as a public and community hospital, and/or for medical care and treatment and/or for nursing care for the people ...Structure or building as the terms are herein used means the 40 bed hospital or building ...

EXHIBIT G

12. All rental payments or purchase payments shall be made by the City from any available City income, lawfully imposed property taxes, ...

Second publication on the 26th day of November, A.D. 1959. ...

ORDINANCE NO. 424

(This Exhibit H of the complaint consists of 8 single-spaced typewritten legal size pages. Part is excerpted here)

AN ORDINANCE AUTHORIZING, CONFIRMING, SUBLEASING WITH OPTION TO PURCHASE AND SETTING OUT THE TERMS OF SAID SUBLEASE PURCHASE AGREEMENT BETWEEN THE CITY OF BRIGHTON, COLORADO, AND THE BRIGHTON COMMUNITY NURSING HOME ASSOCIATION, SAID PROPERTY, TO BE USED AND OPERATED AS A HOSPITAL, AND/OR FOR MEDICAL CARE AND TREATEMENT AND/OR FOR NURSING CARE AND TREATMENT OF PEOPLE NEEDING/DESIRING SUCH CARE AND TREATMENT. ...

... in order to secure the operation of a public and community hospital, and/or for medical care and treatment and/or for nursing care ... Sublessee agrees to continue to pay into the fund as herein provided so long as the Brighton Community Hospital Association is liable to the City for any rental payments. ... Passes on second and final reading this 24 day of November, 1959

(signed) J. William Wells

Mayor ...

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 77CV0782 Div. 4

Donald E. Tyler,	)	
	)	
PLAINTIFF	)	
	)	AMENDMENTS TO
vs.	)	
	)	COMPLAINT
The Hartford Insurance	)	
	)	
Group, Francis Fry,	)	
	)	
Robert S. Brittain,	)	
	)	
DEFENDANTS	)	

COMES NOW the plaintiff to amend his complaint prior to responsive pleading in accord with Rule 15 (a) of the Colorado Rules of Civil Procedure as follows:

1. Paragraph 25 is amended to read as follows:

25. The defendants and each of them have conspired to and have acted

oppressively, wrongfully and maliciously to damage the insurability of the plaintiff for medical professional liability or malpractice insurance, a valuable right, and without notice, hearing, or due process of law for purposes of the foregoing, and in furtherance of aforementioned conspiracy.

2. The first part, to the colon, of paragraph 32 is amended to read as follows:

32. The defendants and each of them have conspired to and have committed and continue to commit and are responsible for the following acts which have been committed in Brighton, Colorado; and the defendants and each of them had knowledge of all of the following enumerated acts which may have occurred prior to their joining the aforementioned conspiracy and which may have occurred prior to their joining the

aforementioned conspiracy and which may have occurred prior to their committing acts alleged in paragraphs 1 through 29 in furtherance of and pursuant to the aforementioned conspiracy: (the remainder of paragraph 32 is unchanged)

3. Immediately to follow paragraph 37, a new paragraph 37A is added as follows:

37A. At times mentioned herein, conspirators Galen Marks and Robert Larsen were officers of the Medical Staff of Brighton Community Hospital, conspirator John Vowell was administrator of Brighton Community Hospital, and previously named conspirator Dale Alter was President of the Board of Directors of the Brighton Community Hospital Association, and these conspirators acted under color of those offices.

4. Paragraph 39A is added to immediately

follow paragraph 39 as follows:

39A. Conspirator Carl McLauthlin was at times mentioned herein President of the Colorado Medical Society and was acting under color of that office.

5. Paragraph 40 is amended to read as follows:

40. The defendants and each of them and each of their co-conspirators committed and continue to commit the forgoing acts and conspiracies under color of the aforementioned municipal statutes of Brighton, Colorado, a subdivision of the state of Colorado, and under color of various other state laws and statutes regulating the insurance business, regulating hospitals, and statutes, rules and regulations relating to the Colorado Medical Society including but not limited to C.R.S. 1973, amended, 10-4-109, 13-21-110,

13-90-107.

5. New paragraph 40A is added to immediately follow paragraph 40.

40A. Exhibits I and J appended hereto and annexed as a part of this complaint are copies of letters caused by the defendants to be sent to the plaintiff pursuant to the foregoing.

6. Paragraphs 25 and 32 as amended are incorporated in paragraph 35, and paragraphs 25, 32, 37A, 39A, 40 and 40A as amended are incorporated in paragraph 42.

By (signed) D. E. Tyler

Donald E. Tyler
Regis. #001401
Attorney for plaintiff
1790 E. Bridge St.
Brighton, Colo 80601
659-4581

November 1, 1976

D. E. Tyler, M. D.

1790 Bridge Street PERSONAL AND

Brighton, Colorado CONFIDENTIAL

Dear Dr. Tyler:

The Risk Management Committee of the State Medical Society has been made aware of the suits which you have pending against members of the Staff and Board of the Brighton Community Hospital. It is furthermore aware of a letter written by the husband of a patient that you contacted in Brighton Community Hospital Emergency Room which apparently was one of the instigating factors in your suit against this gentleman. This information is hearsay only.

The Risk Management Committee of the

EXHIBIT I

Colorado Medical Society exists for the purpose of investigating areas where there is potentially an increased risk of malpractice cases against physicians insured by the Colorado Medical Society-Hartford program. Since, after reviewing some 600 claims in this state over five and one half years, the Risk Management Committee is aware that the angry patient is the one most likely to sue, the Committee is requesting your written permission to examine a random sample of hospital records at the Brighton Community Hospital in which you were the primary physician. It is our understanding that you have practiced very little, if any, at that hospital in recent months or perhaps the last year or two and consequently the permission would have to include a review of the cases when you were more active there. The reason for this review is to assure the

Committee that the quality of these records is sufficient for defense, if a case were brought against you (with or without merit).

For your information House Bill 91 passed by the last session of the Colorado Legislature and signed into law effective July 1, 1976, gives permission to committees such as the Risk Management Committee to request such permission in writing. If you wish, a copy of this bill may be obtained from the headquarters of the Colorado Medical Society. The Risk Management Committee would request such permission in writing no later than 30 days after receipt of this letter.

Sincerely,

(signed) Robert S. Brittain, M.D.

ROBERT S. BRITTAIN, M.D.

Chairman, Risk Management Committee

CMS
COLORADO MEDICAL SOCIETY

1601 East 19th Avenue

Denver, Colorado 80218. Phone (303)534-8580

August 23, 1977

Donald Tyler, M. D.

1790 East Bridge St.

Brighton, CO 80601

(CERTIFIED MAIL)

Dear Dr. Tyler:

The Risk Management Committee of the Colorado Medical Society has received information from past Emergency Room records that your hospital records may be deficient in documentation of history, physical, and patient instruction. The Committee is requesting permission for a physician selected by them to inspect your records at whatever hospital you have used

EXHIBIT J

to see Emergency patients in the past two years and to report back to the Risk Management Committee. Would you please complete the enclosed form and return it to me.

For your information, 13-90-107, C.R.S. 1973, as amended allows committees such as the Risk Management Committee of the Colorado Medical Society to examine records of patients if the physician gives such permission. Permission of the patient is not required. If you have any questions, I can be reached at 442-4660.

Very sincerely,

(signed) J.H. Poynter

Joseph H. Poynter, M.D.

Chairman, Risk Management Committee

JHP:pjc

CMS

COLORADO MEDICAL SOCIETY

1601 East 19th Avenue

Denver, Colorado 80218. Phone(303)534-8580

TO: Chairman, Risk Management Committee

Colorado Medical Society

(Certified Mail)

I, Donald Tyler, M.D., do hereby authorize a representative of the Risk Management Committee of the Colorado Medical Society to examine my medical records at whatever hospitals I have used to see Emergency patients in the past 2 years and to report those findings back to the Risk Management Committee. I understand that 13-90-107, C.R.S. 1973, as amended, allows committees such as the Risk Management Committee of the Colorado Medical Society to examine records of patients if the physician gives

such permission. Permission of the patient is not required.

(unsigned)
(Signature) Donald E. Tyler, M.D.

(undated)
(date)

COLORADO COURT OF APPEALS

NO. 77-894

DONALD E. TYLER,	
Plaintiff-Appellant,	NOT SELECTED
v.	FOR
DONALD GAYLOR	PUBLICATION
and DALE ALTER,	NOT TO BE
Defendants-Appellees,	CITED AS
and	PRECEDENT IN
DONALD E. TYLER,	ANY COLORADO
Plaintiff-Appellant,	COURT
v.	
GAYLOR'S FOOD STORE, INC., MARGARET MUMBY, DONALD GAYLOR, WILMA GAYLOR and MAUDE GAYLOR,	
Defendants-Appellees	

Appeal from the District Court of Adams

County Honorable Dean Johnson, Judge

JUDGMENTS AFFIRMED

DIVISION III

Opinion by JUDGE SMITH

Ruland and Sternberg, jj., concur

Donald E. Tyler Pro se

Ontario, Oregon

Stephen Dawson

Littleton, Colorado

Paul D. Renner, P.C.

Denver, Colorado

Attorneys for Defendant-Appellee

Dale Alter

Gaunt, Dirrim and Coover

Bradley Coover

Brighton, Colorado

Attorneys for Defendants-Appellees

Donald, Wilma, and Maude Gaylor

Littell, Everstine & Kickinson

Gilbert Dickinson

Duane Littell

Denver, Colorado

Attorneys for Defendants-Appellees

Gaylor's Food and Margaret Mumby

Opinion filed and judgment entered on the 14th day of June, 1979 Clerk of the Court Mac V. Danford

Plaintiff Tyler, a practicing physician and attorney, filed suit against defendants Dale Alter and Donald Gaylor for libel. Tyler therafter filed another complaint against Gaylor and others alleging a civil conspiracy on the part of the defendants designed to interfere with Tyler's practice of medicine. The two actions were consolidated and following a trial to a jury, verdicts were returned, and judgment was

entered for defendants on all issues. Tyler appeals, and we affirm the judgments.

I

The Libel Action

On June 27, 1974, Donald Gaylor brought his aunt, Margaret Schroer, to the Brighton Community Hospital emergency room to be treated for a superficial cut on the let. After examining Schroer, Tyler refused to treat her, and Schroer then went to a hospital in Denver for treatment. Gaylor therafter complained to Dale Alter, Chairman of the Board of Directors of Brighton Community Hospital Association. Alter requested that Gaylor put his complaint in writing, and Gaylor thereafter mailed a letter to Alter. Alter in turn gave copies of the letter to board members and others connected with the hospital. The letter is as follows:

"July 3, 1974

Mr. Dale Alter

Chairman of the Board of Directors

Brighton Community Hospital

Dear Dale:

On Thursday, June 27, 1974 at approximately 5:30 p.m. I brought my aunt, Miss Margaret Schroer to Brighton Community Hospital for emergency treatment. She had received a bad cut on her leg from a lawn mower accident which needed medical attention. The action taken by Dr. Tyler who was on duty was very distressing to me, my family and my friends. After discussion with Dale Alter, I am writing this letter to the board and chief of staff asking that the situation be reviewed and corrected.

The decision by Dr. Tyler was that my aunt, Miss Schroer, should seek medical

attention elsewhere because she was not and probably would not be a patient of his. The whole situation was very unprofessional and is not in my opinion the reason for which Brighton Community Hospital was built. It is my feeling that the hospital was built to serve all citizens of the Brighton area and in particular adminster emergency treatment to anyone regardless of who they are and regardless of who there doctor is.

This type of situation can only hurt the image of Brighton Community Hospital and I support action to correct what I feel was the wrong approach in dealing with people who need attention and the service of Brighton Community Hospital.

Sincerely,

Donald G. Gaylor."

The trial court determined as a matter of law that this letter was libelous per se as it related to Tyler. We are not bound by this conclusion since questions of law decided by the trialcourt are reviewable upon appeal. American National Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970), and we disagree with the trial court's ruling.

It is a question of law whether any specific communication is defamatory and thus constitutes libel or slander. Downing v. Brown, 3 Colo. 571 (1877). In our view, the communication at issue here is not defamatory and thus is not actionable. It is well settled that mere words of opinion indicating that a defendant dislikes a plaintiff or does not respect him are not actionable. See Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The words used here

merely demonstrate Gaylor's strong disagreement with the way the incident in the emergency room was handled. There is no assertion that the facts which Gaylor recites in the letter are untrue, and his opinion is based solely upon those facts. The letter does not imply that there are, nor does it refer to any undisclosed facts. Expression of such an opinion, even in the most pejorative terms, cannot be actionable. Bucher v. Roberts, ___Colo.___, ____P.2d____ (No. C-1643 announced 29 May, 1979). Therefore, even though the trial court's ruling in this regard was incorrect, the judgment which resulted from the jury's verdict was a proper disposition of the case, and that judgment is affirmed. Because of our determination that the letter was not defamatory or capable of a defamatory

meaning, and thus was not actionable, it is not necessary to address any of the plaintiff's assignments of error with regard to the conduct of the trial.

II

The Conspiracy Action

Citing Pratt v. British Medical Association, (1919) 1 K.B. 244, 9 B.R.S. 982, Tyler bases his damage complaint for conspiracy on averments that defendants collectively schemed and connived to prevent him from exercising his common law right to practice and carry on a lawful profession without wrongful and illegal interference.

Tyler argues that the trial court committed error when it refused to direct a verdict in his favor on the conspiracy claim and by permitting the issue to go to the jury. Tyler relies essentially upon the same evidence that was adduced to support

his libel claim, and our review of the same evidence reveals that there was no direct proof of a conspiracy. At most, the evidence supports the existence of a conspiracy only by inference. The necessary inferences could only be reached by the finder of fact if the testimony of the defendants concerning their lack of conspiratorial intent or intent to injure Tyler were to be disbelieved. Since there were factual issues and disputes relative to the conspiracy, and inasmuch as there was evidence to support alternate resolutions of these issues, a directed verdict would have been improper. See, e.g., Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

We have considered Tyler's numerous other assignments of error and conclude that they are wholly devoid of legal merit.

Judgments affirmed.

JUDGE RULAND and JUDGE STERNBERG concur.

BRIGHTON COMMUNITY HOSPITAL

1850 EGBERT STREET, BRIGHTON,

COLORADO 80601

PHONE 659-1531 AREA CODE 303

October 23, 1974

Donald E. Tyler, M.D.

1790 Bridge Street

Brighton Colorado

Dear Dr. Tyler:

Your hearing date has been rescheduled for

Thursday, October 31, 1974, 12:00 noon at

Brighton Community Hospital.

Sincerely,

(signed Galen M. Marks, M.D. by J.K.)

Galen M. Marks, M.D.

Chief of Medical Staff

EXHIBIT D

Accredited by the Joint Commission on

accreditation of hospitals

BRIGHTON COMMUNITY HOSPITAL

1850 EGBERT STREET, BRIGHTON,

COLORADO 80601

PHONE 659-1531 AREA CODE 303

September 26, 1974

Donald Tyler, M.D.

1790 Bridge Street

Brighton, Colorado 80601

Dear Dr. Tyler:

A request for corrective action concerning your Emergency Room care and conduct has been received by the Executive Committee. In accordance with the By-Laws of the Brighton Community Hospital Medical Staff, the Executive Committee requests your attendance with the Executive Committee at 12 o'clock noon on October 17, 1974 at the Brighton Community Hospital.

Yours truly,

(signed) Galen D. Marks

Galen Marks, M.D.,

Chairman, Executive

Committee

EXHIBIT E

Accredited by the Joint Commission of

Accreditation of Hospitals

BUSINESS MINUTES Date October 31, 1974

EXECUTIVE STAFF MEETING

Minutes of the meeting of the Executive Staff The meeting was held in the Conference Room at the Brighton Community Hospitals at 12:00 noon, 1974, October 31st.

ATTENDING MEETING: Dr. Galen Marks, President

Dr. Robert Larsen, Vice President

Dr. Bill Waddell, Secretary

Mr. Orrel Daniels, Hospital Legal Counsel

John Vowell, Hospital Administrator

The meeting was called to order at 12:00 noon. The purpose of the meeting as called by the President of the Staff was in accordance with the Medical Staff By-Laws provisions covering hearings. The hearing to be conducted was that of Dr. Don Tyler. Dr. Tyler had been notified by certified

mail of the time and place of the hearing.

1:45 P.M. Dr. Tyler had not appeared at the meeting. The meeting adjourned.

No action taken.

(signed) John Vowell

John Vowell, Administrator

EXHIBIT F

CMS

COLORA DO MEDICAL SOCIETY

1601 East 19th Avenue

Denver, Colorado 80218-Phone (303)534-8580

Donald E. Tyler, M. D.

1790 Bridge Street

Brighton, Colorado

Dear Dr. Tyler:

As you were advised by my letter of November 1, 1976 the Risk Management Committee of the Colorado Medical Society requests permission to examine hospital records of yours at Brighton Community Ho spital over the past three years. This request is specifically in reference to emergency room patients.

You should be advised that failure to cooperate with the Risk Management Committee of the Colorado Medical Society would require that that Committee so inform

the Hartford Insurance Company, your carrier.

The Committee expects written permission to examine the above mentioned records to be received by a representative of that Committee at 3501 South Corona Street #7, Englewood, Colorado 80110 no later than January 31, 1977.

Very sincerely yours,

(signed) Robert S. Brittain M.D.

ROBERT S. BRITTAIN, M.D.

MEMBER

Risk Management Committee

(signed) Wilfred Stedman, M.D.

WILFRED STEDMAN,, M.D.

Chairman

Risk Management Committee

Denver Regional Office

820 Grant Street THE HARTFORD

Denver, Colorado 80203

Telephone:(303)837-1515

April 26, 1977

Donald E. Tyler, M.D.

1790 East Bridge Street

Brighton, Colorado

Dear Dr. Tyler:

The underwriting department of Hartford has been kept abreast of the on-going efforts of the Risk Management Committee of the Colorado Medical Society to inspect your emergency room records at Brighton Community Hospital. We understand numerous requests have been made to inspect records whether you are keeping adequate emergency room records.

Hartford works in close cooperation with

the Risk Management Committee and, among other things, uses records and information concerning medical records for premium computation.

One of the conditions of your policy with the Hartford, Condition 1 on page 4 of the General Policy Provisions section provides the insured "... shall send copies of such records to the company ... at such times during the policy, as the company may direct." We feel compliance with this policy condition is a condition precedent to any duty on Hartford's part to continue coverage beyond your renewal date on December 11, 1977, and hereby formally demands the opportunity to review your emergency room records at Brighton Community Hospital for the past three years.

I also want to advise you that Hartford's

contract with the Colorado Medical Society provides the company may refuse to renew a physician in the event he or she fails to cooperate with the Risk Management Committee. Please reconsider your position relative to the examination of your records as a continued refusal to provide these records to the Hartford may well lead to a decision not to renew your coverage come December 11, 1977.

Please call me if you have any questions.

Yours very truly,

(signed) Thomas H. Mitchell

Thomas H. Mitchell

Underwriter

Casualty Department

TM:gn

WARREN & SOMMER INCORPORATED

SUITE 500/3955 East Exposition

DENVER, COLORADO 80209

Telephone 303-744-3711

April 26, 1977

Donald E. Tyler, M. D.

1790 Bridge Street

Brighton, Colorado

Re: Donald E. Tyler vs Gaylor, et al

Dear Dr. Tyler:

You may recall I wrote you on behalf of the Hartford Insurance Company on March 29, 1977, concerning problems encountered by the Risk Management Committee of the Colorado Medical Society in its attempt to review your emergency room records at Brighton Community Hospital. You were then advised Hartford would be unable to renew your policy on December 11, 1977, your annual renewal date. The notice of

non-renewal was based solely on your refusal to permit the Committee to review your emergency room records. The purpose for that request was to determine whether medical care rendered by you was being adequately documented in the event you were to be sued.

Dr. Brittain of the Risk Management Committee has recently advised Hartford the Committee wishes to give you the opportunity to discuss this matter with the Committee before it makes any final recommendations concerning non-renewal. I've also been advised a representative of the Committee has written you in this regard.

Accordingly, Hartford plans to reserve its decision on non-renewal until you meet with the Committee and the Committee has

made further recommendations.

Without waiver of any rights under the policy, and more specifically, the right to contend your refusal to cooperate with the Committee is proper grounds for non-renewal, Hartford is for the time being withdrawing the notice of non-renewal as set forth in my letter of March 29, 1977.

I'm sure you understand the request to examine your records is not personal and was not and is not intended to be a reflection on the way you practice medicine. Similar requests have been directed to numerous doctors in an effort to evaluate the manner in which records are kept and to assist and educate these physicians. I urge you to cooperate with Hartford and the Committee in permitting review of your records.

Sincerely,

(signed) Bill Buckm---

William M. Buckman

Vice President

WMB/jg

cc: Wilfred Stedman, M.D.

Herbert J. Rothenberg, M.D.

James A. Henderson, M.D.

Robert S. Brittain, M.D.

CMS

COLORADO MEDICAL SOCIETY

1601 East 19th Avenue

Denver, Colorado 80218-Phone (303) 534-8580

April 26, 1977

PERSONAL AND CONFIDENTIAL

Donald E. Tyler, M.D.

1790 East Bridge Street

Brighton, Colorado

Dear Dr. Tyler:

I have written you on two separate occasions, on November 1, 1976, and on January 12, 1977, requesting on behalf of the Risk Management Committee of the Colorado Medical Society, permission to examine your hospital records at Brighton Community Hospital over the past three years. That request to examine records, outstanding since November 1, 1976, was also verbally communicated to you at the time of my

deposition on January 4, 1977, and thereafter to your former attorney, Mr. Mitchem.

Because of your failure to cooperate with the Risk Managemnt Committee, the Committee recommended that Hartford refuse to renew your professional liability coverage.

Although the Committee's recommendation is that your coverage not be renewed on the annual renewal date, we want to give you the chance to discuss this matter with the Committee. We want to discuss this matter with you personally before making any final recommendation to Hartford concerning non-renewal.

The Committee has now asked that Hartford reserve any final decision whether to renew your policy until we've had a chance to discuss this matter with you and make further recommendations.

Would you be kind enough to give me a call and let me know whether you would be willing to meet with the Committee to discuss this matter?

Our next committee meeting is set for Monday, May 9, 1977, at 8:30 P.M. at Colorado Medical Society, 1601 East 19th Avenue, Denver, Colorado. If you don't contact me, please consider this letter as a formal request that you meet with the Committee on May 9, 1977, to discuss the matters of your cooperation with the Committee and the Committee's recommendation concerning non-renewal of coverage. If you fail to attend the meeting, the Committee will make a final recommendation against renewal of coverage on that date. In that event you will again be notified of our recommendation against renewal and will have 30 days from your receipt of

notification of non-renewal to appeal this decision to the Board of Trustees of the Colorado Medical Society.

Very sincerely yours,

(signed) Robert S. Britt--- MD

Robert S. Brittain, M.D.

Member

Risk Management Committee

RSB/mhs

DONALD E. TYLER, M.D.

UROLOGIST

1790 East Bridge Steeet

Brighton, Colorado 80601

Telephone 659-4581

September 9, 1977

Joseph H. Poynter, M.D.

Chairman, Risk Management Committee

2750 Broadway

Boulder, Colorado

Dear Doctor Poynter:

I have received the request of you and those you represent to examine the records of my patients. You have stated that my records may be deficient.

I request the following information:

1. Who reported information concerning records of my patients to the Risk Management Committee?

2. Who reported information concerning

records of my patients to you?

3. When was each of those reports made?

4. Where were each of those reports made?

5. What were the contents of each of such reports?

6. What patients' records are considered to possibly be deficient?

7. Who (names please) determined that they may be deficient?

8. In what respects are each of such records considered to possibly be deficient?

9. Have you examined any records of my patients? If so, please identify which records you examined with exactness, and who supplied them to you, when and where.

10. Has the committee examined any records of my patients? If so, please identify exactly which records were examined and who supplied them, and when and where they were supplied.

11. By whose permission were each of such records examined?

12. What is the purpose of your request? Of course, you are aware that the Risk Management Committee has already made a recommendation that my professional liability insurance not be renewed and this has been acted upon. What do you intend now? You are undoubtedly aware that matters with which you are involving yourself are properly before two courts of law.

My patients expect me to not reveal confidences. It is against my ethics to not cause a breach of that expectation and I respect and observe the same ethics concerning patients of other physicians. It is recognized, and by your letter, that those may not be the same as your ethics or those

of the organizations which sponsored the legislation you cited.

I hope you will cooperate and supply me with the above information so that I might have some idea of your interest.

I do not know of any patients whom I have seen as emergencies in any hospital Emergency Room in the past two years. I sincerely request that you reconsider your involvement in this matter.

Yours truly,

(signed) D.E. Tyler

Donald E. Tyler, M.D., J.D., FCLM

cc:

Robert Brittain, M.D.

Herbert Rothenberg, M.D.

James Henderson, M.D.

Wilfred Stedman, M.D.

Carl McLauthlin, M.D.

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 77CV0782

Division 4

DONALD E. TYLER,	)	
	)	FINDINGS
Plaintiff,	)	
	)	CONCLUSIONS
vs.	)	
	)	AND ORDERS
THE HARTFORD INSURANCE GROUP, FRANCIS FRY, and ROBERT S. BRITTAIN,	)	
	)	
Defendants	)	

This matter coming on to be heard on the motion of the defendants to dismiss on November 3rd, 1977, the Court having heard arguments of counsel and reviewed the briefs, makes the following Findings, Conclusions and Orders concerning said Motion to Dismiss:

The plaintiff has alleged five causes of

action in his Complaint, and the Court will deal with each cause of action as pled by the plaintiff.

The plaintiff has alleged claims of libel and slander in Claims 1 and 2 of his Complaint, and the Court will deal with them jointly.

In reviewing the plaintiff's complaint, the Court concludes that the plaintiff has alleged the essential elements necessary for maintaining an action in libel and slander.

Defendants claim that the factual circumstances surrounding the incident constitutes privilege on various grounds. One, with respect to documents pertaining to litigation.

The law in Colorado is that publication of a legal proceedings is qualifiedly privileged, but not until it has gone into court and thereby becomes public; and a qualified

privilege permits only the publication of a truthful statement of the matter as it took place in the court hearing. Switzer v. Anthony, 206 P. 391.

While publication concerning a legal proceeding is qualifiedly privileged, the matter must be pending in court, and must be a truthful statement, otherwise the publication is not privileged. Towles v. Meador, 272 P. 625.

The plaintiff is alleging a non-truthful statement made prior to the existence of the point in time where the public aspect of the judicial proceedings exists.

The defendants also cited Lininger v. Knight, 226 P. 2d 809 for the proposition that the letter itself would be absolutely privileged since sent by a citizen to the officials of a public entity. The plaintiff here

is alleging a republication of this letter to individuals of private, not public interest.

A privileged statement repeated on a non-privileged occasion is actionable. C.J.S., Libel and Slander, Section 98.

Any qualified privilege which the defendants assert, i.e., communication in good faith upon a subject matter in which the party communicating has legitimate individual public or group interest (Ling v. Whittemore, 343 P.2d 1048), or inter office memoranda (Abrahamsen v. Mountain States Tel. & Tel. Co., 494 P.2d 87), can be lost, and for the purposes of a motion to dismiss, must be determined inadequate to constitute grounds for dismissal, because plaintiff has alleged malice, the burden is upon the plaintiff to prove malice when a qualified privilege is found by the Court to

exist.

Questions of good faith on the part of the defendants and the honest belief in the truth of the statements put forth by them are all factual matters for the trier of the facts. Abrahamsen v. Mountain States Tel. & Tel. Co., 494 P.2d 1287.

The Court concludes as to Claims 1 and 2, that the plaintiff has sufficiently pled a cause of action and further factual determination must be made by the trier of the facts before the defense of privilege would lie. Therefore the motion to dismiss Claims 1 and 2 should be denied.

The Third Claim for Relief of the plaintiff attempts to allege numerous causes of action arising out of an anticipatory breach of contract, conspiracy to interfere and obstruct the plaintiff in the practice of

medicine, and conspiracy to breach the contract.

The defendants maintain that the plaintiff is alleging a breach of an existing insurance contract which does not expire until December 11, 1977, and the plaintiff contends, however, that he is alleging an anticipatory breach of his expectancy of renewal of the insurance contract, and therefore the basis of his claim for relief.

The plaintiff is further stating as a basis for his third claim for relief the provisions of 10-4-109, CRS 1973, as amended, which provides for renewal unless certain conditions are met.

The Court in reviewing this section of the statute could use the plaintiff's argument to his disadvantage since the provision is actually for non-renewal.

The instant situation may be analogized to the case of Jones v. Hopper, 410 F. 2d 1323, where the Court dismissed an action based on expectancy of renewal of employment, because a statute pertaining to employment of state teachers specifically denied an expectancy of renewal, and the statute necessarily become a part of any contract entered into by the parties.

In the present case, the Hartford gave lawful notice of termination as required by 10-4-109, CRS 1973, providing that non-renewal of a medical malpractice insurance is conditioned upon the absence of the happening of certain events.

"The provision specifically denies an expectancy to continued employment; therefore, absent an expectancy, there should be no interest. One has no

constitutional right to a remedy against the lawful conduct of another." Jones v. Hopper.

The Court further concludes that the statute does not provide an expectancy in the plaintiff and therefore any action on his part at this time would be premature, in that there has not been any breach of the existing contract, nor is he entitled to any expectancy of renewal of that contract.

His other causes of action, coupled in his third cause of action, concerning conspiracy to breach the contract, fail to allege a cause of action upon which relief may be granted, for the reasons heretofore mentioned.

The Court concludes that the motion to dismiss the third cause of action has merit and should be granted.

The plaintiff has alleged in his fourth

cause of action a violation of his civil rights under the provisions of 42 USC, Section 1983.

Under the provisions of Section 1983, in order to maintain a cause of action, allegations necessary to state a claim of deprivation of civil rights under color of state law are not to be held insufficient unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Jones v. Hopper, 410 F.2d 1323.

The basic requirements of a civil rights complaint are: (1) the conduct complained of was engaged in under color of state law, and (2) that such conduct subjected the plaintiff to a deprivation of rights, privileges, or immunities secured by the Federal Constitution and laws. Jones v. Hopper, supra.

The plaintiff in the instant case alleges

that 10-4-109, Colorado Revised Statutes, 1973, as amended, brings the actions of Hartford Insuran ce within the scope of 42 USC 1983..

The Court concludes that merely acting under a state license is not state action within the meaning of this section, Ouzts v. Maryland National Ins. Co., C.A. Nev. 1972, 470 F.2d 790, unless the state is otherwise connected with the challenged conduct. Holmes v. Elks Club, Inc., D.C. Fla 1975, 389 F.Supp. 854.

Neither does the fact that a private corporation enjoys an economic monopoly which is protected and regulated by the state necessarily bring its every act within the purview of this section. Martin v. Pacific Northwest Bell Tel. Co., C.A. Or. 1971, 441 F.2d 1116.

State regulation of a business does not transform a private party's activities into state action for purposes of this section. Scott v. Eversoll Mortuary, C.A.Cal. 1975, 522 F.2d 1110; Johnson v. Heinemann Candy Co., Inc. D.C.Wis. 1975, 402 F.Supp. 714.

The Court further concludes that the mere fact that a state has legislated in the area of the conduct complained of does not in and of itself constitute sufficient participation to be appropriately denominated "state action." Barrett v. United Hospital, 376 F. Supp. 791. Shirley v. State National Bank of Connecticut, 493 F.2d 739.

The situation before the Court is analagous to that in the Shirley v. State National Bank of Connecticut case in that the only involvement through the statute cited is prohibitive of a right to renew or cancel

existing insurance on expiration of the contract.

The statute provides only that notice and cause (if demanded) be given.

Hartford is not using a power conferred by the state to injure or deprive the plaintiff in this case of his rights guaranteed by the Federal Constitution. Thus, the requisite "color of law" is absent from the plaintiff's claim and in the Court's opinion fatal to maintaining any cause of action under this section.

The Court therefore concludes that the defendants' motion to dismiss the fourth cause of action has merit and should be granted.

The plaintiff has alleged in his Fifth Cause of Action outrageous conduct on behalf of the defendants to his damage, and in reviewing the Fifth Cause of Action, the plaintiff has sufficiently pled the elements

which if found to exist would substantiate the cause of action known as outrageous conduct, and therefore the motion to dismiss at this time as to the Fifth Cause of Action would be premature, and therefore should be denied.

The last question raised was one of punitive damages, and under the provisions of the state the plaintiff has alleged malice, wanton and reckless disregard of the rights and feelings of the plaintiff, and would be if the plaintiff sustained his burden of proof actionable as provided by the statute.

Therefore the Court concludes that the plaintiff has sufficiently pled punitive damages as provided by the statute to overcome at this time a motion to dismiss.

IT IS THEREFORE ORDERED, that the Motion to Dismiss as to the First, Second and Fifth Claims for Relief and allegations

dealing with punitive damages is hereby denied. As to the Third and Fourth Claims for Relief, the Motion to Dismiss is hereby granted.

The Court orders the defendants to file responsive pleadings as to the remaining claims for relief of the Complaint within thirty(30) days from the receipt of this order.

Done in open Court this 16th day of December, 1977.

BY THE COURT:

(signed) Anthony F. Vollack

District Judge

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 77CV0782, Div. 4

DONALD E. TYLER,	
Plaintiff,	FINDINGS
vs.	CONCLUSIONS
THE HARTFORD INSURANCE GROUP, FRANCIS FRY and ROBERT S. BRITTAIN,	AND ORDERS
Defendants	

THIS MATTER, Defendants' Motion for Summary Judgment, having come on to be heard on December 12, 1980, the Court, having heard arguments of counsel, read the briefs submitted, and being fully advised in the premise, enters the following Findings, Conclusions and Orders.

The undisputed facts are that Plaintiff,

Dr. Donald Tyler, filed the instant suit in April 1977 asserting claims of libel, slander, civil conspiracy, a violation of civil rights pursuant to 42 U.S.C. § 1983, and outrageous conduct against the Defendants. The claims of libel, slander, and outrageous conduct (Counts 1, 2, and 5 respectively) are based on the alleged publication and republication by the Defendants of certain statements contained in a letter written by Donald Gaylor to Dr. Galen Marks, Chief of Staff of the Brighton Community Hospital (hereinafter the "Gaylor letter," Exhibit A of the Complaint). The Gaylor letter concerns an incident which occurred at the Brighton Community Hospital between Plaintiff and Ms. Margaret Schroer, Donald Gaylor's aunt. Plaintiff asserts that Defendant Fry, an employee of Defendant Hartford Insurance Group,

republished the letter to Defendant Brittain, who in turn republished the contents of the letter orally to other persons. The Court granted Defendants' Motions to Dismiss the Counts of conspiracy and civil rights violations on December 16, 1977.

Plaintiff had previously filed suit in 1975 in Boulder County (the case was subsequently transferred to Adams County) against other Defendants. The Adams County suit, Tyler v. Gaylor, was also base on the Gaylor letter; however, the letter which was the subject of that suit was from Donald Gaylor to Dale Alter, Chairman of the Board of Directors of the Brighton Community Hospital. In all other respects the letters are identical, except that the letter to Dr. Marks is signed by Mr. Gaylor and the letter to Mr. Alter is not signed. In Tyler v. Gaylor the Court

ruled as a matter of law that the Gaylor letter was libelous per se. The case was submitted to a jury, which returned a verdict for the Defendants. On appeal, the Court of Appeals reversed the trial judge's determination, holding that the letter was not an actionable form of libel (Decided June 4, 1979, No. 77—894). The Court of Appeals decision was not chosen for official publication. The Supreme Court of Colorado denied Plaintiff's petition for certiorari on October 9, 1979.

Defendants contend that there is an absence of any genuine issues of material fact which would require submission of the case to a trier of fact. Defendants assert that Plaintiff is precluded by the doctrine of collateral estoppel from litigating his claims of libel and slander, since these claims are based on the Gaylor letter, which

was determined to be non-actionable. Defendants also contend that Plaintiff's claim of outrageous conduct can be determined as a matter of law because "mere words" are not actionable.

Plaintiff denies that there are no material issues of fact to be determined. Plaintiff asserts that the Court of Appeals opinion may not be used as a precedent or to collaterally estop him from litigating his charges against the Defendants. Plaintiff also contends that the Gaylor letter was quoted incorrectly in the Court of Appeals opinion, and collateral estoppel should not be applied by this Court because the letter which is the subject of this action is different from the letter determined to be non-actionable by the Court of Appeals.

At the outset, the Court disagrees with

Plaintiff's assertion that the Court of Appeals incorrectly quoted the Gaylor letter in its opinion. After a careful examination of the letter attached as an exhibit to the Adams County complaint and the quote in the Court of Appeals opinion, the Court concludes that the quote is complete and correct. The Court also notes that the letter which was the subject of the Adams County case is identical to the letter at issue here, with the exception of the aforementioned different addressees and missing signature. Plaintiff himself, in his "Response to Defendants' Motion to Dismiss for Lack of Prosecution," filed June 25, 1979, stated:

> 1. The letter subject of this action designated as EXHIBIT A of the complaint has the same content as the letter subject of Civil Action 26884, District Court of Adams County, and action for libel.
>
> ...

> 5. Final determination of aforementioned civil action and appeal is essential and is expected to be determinative of certain issues in this instant claim, and particularly to the cliam of libel.

(Plaintiff's Response, p. 1).

The Doctrine of collateral estoppel holds that "the final decision of a court on an issue actually litigated and determined is conclusive of that issue in any subsequent suit." Pomeroy v. Waitkus, 183 Colo. 344, 517 P. 2d 396, 399 (1973). "The rule .. limit/s/ litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." Bernhard v. Bank of America Nat. Trust & Sav. Ass'n., 19 Cal. 2d 807, 122 P. 2d 892, 894 (1942) (citations omitted). In their motion, Defendants are attempting to invoke defensive collateral estoppel--they are seeking to prevent Plaintiff from

relitigation an issue which he previously litigated in another action, with another party. Because the Plaintiff, in the earlier action, had both the ability to choose the forum and the incentive to pursue the action vigorously (including joining potential defendants in the first action), the use of defensive collateral estoppel generally does not create any unfairness or inequity. Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 329 (1979).

In Pomeroy v. Waitkus, supra, the Colorado Supreme Court enumerated four tests to be used to determine if collateral estoppel may be applied:

> First, was the issue decided in the prior adjudication identical with the on presented in the action in question? Second, was there a final judgment on the merits? Third, was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? And, fourth, did the party against whom the plea is asserted have a full and fair

opportunity to litigate the issue in the prior adjudication?

517 P. 2d at 399 (emphasis added).

In the instant case, all four tests given in Pomeroy have been met. The decisive issue in Tyler v. Gaylor was whether the Gaylor letter was defamatory. Plaintiff also bases his claims of libel and slander against these Defendants on the Gaylor letter. Plaintiff does not allege that Defendants made any defamatory statements, written or oral, other than those contained in the Gaylor letter. Therefore, the issue decided in the prior case, the defamatory nature of the letter, is identical with the issue presented in the instant case.

The second test is also met. A final determination on the merits exists in the Tyler v. Gaylor action. The Court of Appeals expressly held that the Gaylor

letter was not defamatory, and the Plaintiff's Petition for Certiorari was denied by the Colorado Supreme Court.

Defendants meet the third test because they are asserting the doctrine of collateral estoppel against Plaintiff, who was a party in the prior action. Murphy v. Northern Colorado Grain Co., Colo. App. 21, 488 P. 2d 103 (1971).

Defendants also meet the fourth test. Plaintiff had a full and fair opportunity to litigate the issue of the nature of the Gaylor letter in the prior adjudication. Plaintiff was permitted to present evidence to the jury on the defamation issue, and appealed the jury verdict to the Court of Appeals. Plaintiff obviously had both the incentive and opportunity to fully litigate the question, and did so.

Because all four tests are met and collateral estoppel applies to preclude Plaintiff from asserting that the Gaylor letter is defamatory and actionable, Plaintiff's first and second claims must fail. Defendants could not be guilty of libeling or slandering Plaintiff by publishing non-defamatory statements.

The tort of outrageous conduct, Plaintiff's fifth claim against the Defendants, is defined as "extreme and outrageous conduct intentionally or recklessly /done which/ causes severe emotional distress to another ..." Liability exists only when the conduct complained of is both extreme and outrageous.

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as

> to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "outrageous! "

Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753, 756 (1970).

Colorado has adopted Section 46, Comment h of the Restatement of Torts, which states:

> It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Blackwell v. Del Bosco, 35 Colo. App. 399, 536 P.2d 838, 841 (1975), aff'd 191 Colo. 344, 558 P.2d 563 (1976).

It is therefore a reprequisite to

submission of a claim of outrageous conduct to the finder of fact that the Court determine as a question of law whether reasonable people could differ as to the outrageous nature of the actions complained of.

Mere words, however profane or insulting, will not establish a cause of action for outrageous conduct. See Meiter v. Cavanaugh, 40 Colo. App. 454, 580 P.2d 399 (1978); Holtz v. United Airlines, Inc., No. 76-A-513 (D.Colo. June 6, 1977). In the instant action, the foundation for the claim of outrageous conduct is the allegations contained in Counts 1 and 2 concerning Defendants' communication of the contents of the Gaylor letter. The words allegedly written and/or spoken are not even profane or obviously insulting, and have been determined to be non-defamatory. In light of the foregoing, the Court is of the opinion

that a reasonable person could not find that the Defendants' statements constituted outrageous conduct.

Rule 56(b) of the Colorado Rules of Civil Procedure provides:

> A party against whom a claim, counter-claim or crossclaim is asserted or declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Summary judgment is a drastic remedy, but where there are no genuine issues of legally dispositive facts, it is the duty of the court to enter a summary judgment. Fort Collins Houses v. Fort Collins, 30 Colo. App. 445, 496 P. 2d 1074, 1077 (1972).

For the above stated reasosns, the Court concludes that there is no genuine issue of any material fact. The Court hereby enters summary judgment in favor of the Defendants

and against the Plaintiff in this matter.

SO ORDERED this 8th day of January, 1981.

BY THE COURT:

(signed) Anthony F. Vollack

DISTRICT JUDGE

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 77CV0782, Div. 4

DONALD E. TYLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
THE HARTFORD INSURANCE	)	
	)	
GROUP, FRANCIS FRY,	)	
	)	
ROBERT S. BRITTAIN,	)	
	)	
Defendants.	)	

This matter coming on to be heard on the 21st day of February, 1978, on the motion of the plaintiff to compel the defendants to turn over for inspection files pertaining to the defense of three suits instituted by the plaintiff against Dr. Larsen, Mr. Gaylor and Dr. Marks, in which the Defendant Hartford Insurance Company afforded

defenses in the said suits filed in the Adams County District Court. The files in question based upon statements of counsel for the defendant were prepared in anticipation of trial, and that said materials contained mental impressions, conclusions and opinions and legal theories of the attorneys and other agents of Hartford Insurance Company.

The suits in Adams County were predicated on the same letter from Mr. Gaylor which the plaintiff is contending in the present lawsuit to have been published by the defendants in this action to his damage.

The defendants contend that the materials contained in said files are privileged and not discoverable by the plaintiff.

The defendants contend further that a similar request made by the plaintiff during

discovery procedures in Adams County and the trial judge in that case denied the plaintiff's request to review the files on the grounds that they were privileged under Rule 26 (b) (3), Colorado Rules of Civil Procedure.

The Court concludes based upon statements of counsel that the materials in the subject files were prepared or compiled in anticipation of litigation and that said materials, containing the impressions, conclusions and opinions of the agents of the Defendant Hartford Insurance Company and legal theories of their attorneys concerning the said litigation would not be discoverable under Rule 26 (b) (3).

The Court therefore denies the plaintiff's motion to compel the defendants to produce the three files concerning the Adams County litigation for inspection by the plaintiff in

this case.

Done in open Court, this 28th day of February, 1978.

BY THE COURT:

(signed) Anthony F. Vollack

District Judge